84-782

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF SOUTH CAROLINA, *et al.*,
Petitioners,

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

Whether a four to three majority of the Fourth Circuit Court of Appeals erred in holding:

(1) That the Catawba Indians are immune from state statutes of limitations even though a 1959 federal statute explicitly provides that "the laws of the several states shall apply to them in the same manner they apply to other persons?"

(2) That the Catawba Indians may claim a special legal status under federal law—which would bind the United States as their trustee, permit them to act as a sovereign entity, and enable them to assert a 140-year-old claim under an 1834 federal Indian statute called the Nonintercourse Act—even though a 1959 federal statute explicitly provides that "the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians" and provides that federal Indian statutes "shall not apply to them?"

(3) That the Catawba Indians can assert a claim to land under federal law, based solely on an alleged absence of federal approval for a voluntary sale of that land, even though Congress was aware of the 1840 sale when it passed legislation in 1959 that treated the sale as an accomplished fact, implicitly ratifying the sale?

PARTIES IN THE COURT OF APPEALS

Seventy-six named defendants are alleged to represent a defendant class of 27,000 landowners.[1] The named defendants include individuals, a family trust, a religious organization, private companies, local government or-

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[1] A motion to certify the alleged class was filed but the district court stayed consideration of it pending the ruling on the dispositive motion filed by the defendants which is the subject of the petition.

The named defendants are the State of South Carolina, Richard W. Riley as Governor of the State of South Carolina; County of Lancaster, and its County Council consisting of Francis L. Bell as Chairman, Fred E. Plyler, Eldridge Emory, Robert L. Mobley, Barry L. Mobley, L. Eugene Hudson, Lindsay Pettus; City of Rock Hill, J. Emmett Jerome, as Mayor, and its City Council consisting of Melford A. Wilson, Elizabeth D. Rhea, Maxine Gil, Winston Searles, A. Douglas Echols, Frank W. Berry, Sr.; Bowater Carolina Corporation; Catawba Timber Co.; Celanese Corporation of America; Citizens and Southern National Bank of South Carolina; Cresent Land & Timber Corp.; Duke Power Company; Flint Realty and Construction Company; Herald Publishing Company; Home Federal Savings and Loan Association; Rock Hill Printing & Finishing Company; Roddey Estates, Inc.; Southern Railway Company; Springs Mills, Inc.; J.P. Stevens & Company; Tega Cay Associates; Wachovia Bank and Trust Company; Ashe Brick Company; Church Heritage Village & Missionary Fellowship; Nisbet Farms, Inc.; C.H. Albright, Ned Albright; J.W. Anderson, Jr., John Marshall Walker II, Jesse G. Anderson, John Wesley Anderson, David Goode Anderson; W.B. Ardrey, Jr., Elizabeth Ardrey Grimball, John W. Ardrey, Ardrey Farms; F.S. Barnes, Jr.; W. Watson Barron, Wilson Barron; Archie B. Carrol, Jr.; Hugh William Close, James Bradley, Francis Lay Springs, Lillian Crandall Close, Francis Allison Close, Leroy Springs Close, Patricia Close, William Elliot Close, Hugh William Close, Jr.; Robert A. Fewell; W.J. Harris, Annie F. Harris; T.W. Hutchinson, Hiram Hutchinson, Jr.; J.R. McAlhaney; F.M. Mack, Jr.; Arnold F. Marshall; J.E. Marshall, Jr.; C.D. Reid, Jr.; Will R. Simpson, John S. Simpson, Robert F. Simpson; Thomas Brown Snodgrass, Jr.; John M. Spratt; Marshall E. Walker; Hugh M. White, Jr.; John M. Belk; Jane Nisbet Good, R.N. Bencher, W.O. Nisbet III; Pauline B. Gunter; J. Max Hinson; W.A. McCorkle, Mary McCorkle; William O. Nisbet; Eugenia Nisbet White, Mary Nisbet Purvis, E.N. Martin; Robert M. Yoder.

ganizations and the State of South Carolina. The plaintiff is "The Catawba Indian Tribe, Inc.," a non-profit organization incorporated in 1975 under South Carolina law, and operated by persons who claim to be descendants of Catawba Indians.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, entered on August 17, 1984.

OPINIONS BELOW

On June 14, 1982 the district court granted the defendants' ("petitioners' ") motion for summary judgment and dismissed the action. The decision of the United States District Court for the District of South Carolina (the Honorable Joseph P. Willson sitting by designation of Mr. Chief Justice Burger) is unreported but appears in the Appendix as Exhibit E.

The plaintiff ("respondent" or "Catawbas") appealed, and, on October 11, 1983, a divided three-judge panel reversed the district court's decision. The majority and

dissenting opinions of the original panel[1] are reported at 713 F.2d 1291-1303 (4th Cir. 1983) and appear in the Appendix as Exhibits B and C, respectively.

The petitioners sought and obtained a rehearing *en banc*.[2] On August 17, 1984, in a single paragraph *per curiam* opinion, four judges adopted the majority opinion of the original panel and three judges adopted the dissenting opinion. One judge who joined in the *en banc* majority decision also issued a concurring opinion. The *en banc per curiam* decision and the concurring opinion are reported at 740 F.2d 305 (4th Cir. 1984) and appear in the Appendix as Exhibits A and D.[3]

JURISDICTION

This Court has jurisdiction to review the final decision of the court of appeals under 28 U.S.C. § 1254(1) (1976).

STATUTE TO BE CONSTRUED

The decisions below construed a 1959 Act of Congress, 25 U.S.C. §§ 931-938 (1976), the complete text of which is reprinted in the Appendix as Exhibit F. Section 5, which is the principal focus of the decisions, provides:

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[1] The original panel was Senior Judge Butzner and Judges Hall and Sprouse. Senior Judge Butzner wrote the majority opinion. Judge Hall wrote the dissenting opinion.

[2] Seven judges of the Court of Appeals for the Fourth Circuit formed the *en banc* panel. Only six of the nine active judges of the Fourth Circuit Court of Appeals participated. Judges Russell and Chapman from South Carolina and Judge Ervin from North Carolina recused themselves. Senior Judge Butzner was the seventh judge who participated in the *en banc* decision because he was a member of the original three-judge panel.

[3] The *en banc* majority was composed of Chief Judge Winter, Senior Judge Butzner, and Judges Murnaghan and Sprouse. Judges Hall, Phillips and Widener dissented. Judge Murnaghan authored the concurring opinion.

> The constitution of the tribe adopted pursuant to the Act of June 18, 1934 (48 Stat. 984), as amended, shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in sections 931-938 of this title, however, shall affect the status of such persons as citizens of the United States.

STATEMENT OF THE CASE

I. The Parties And The Nature Of The Claim

By this action, the respondent seeks to "destroy the titles of more than 27,000 South Carolina citizens"[4] to approximately 144,000 acres (225 square miles) of land at the northern border of South Carolina in York, Lancaster and, perhaps, Chester Counties.[5] The respondent claims the current right to own and possess this land and demands trespass damages from 1840 to the present.

The land in dispute encompasses the City of Rock Hill, the town of Fort Mill, and a number of smaller communities. Thousands of families, as well as small businesses, farms, trusts, lending institutions, manufacturers, churches, charitable organizations, local governments, and the State of South Carolina currently hold interests in the land. Seventy-six individuals, companies and public entities have been named as defendants and as represen-

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[4] Appendix, Ex. C, p. 24a (the dissenting opinion).

[5] The precise boundaries of the land at issue are uncertain because of the poor quality of eighteenth-century surveying and mapping.

tatives of an uncertified putative defendant class alleged to consist of more than 27,000 persons.

Respondent is a non-profit organization incorporated in 1975 under South Carolina law which calls itself "the Catawba Indian Tribe." This organization contends that a voluntary sale of the lands in issue pursuant to an 1840 treaty with the State of South Carolina was invalid, that it retains today the right to void the 1840 transaction, that it may recover millions of dollars in damages for nearly a century-and-a-half of alleged trespasses, and that it may dispossess thousands of innocent people from their homes and farms and businesses. According to the respondent, a federal statute known as the Nonintercourse Act[6] required federal approval or consent to this voluntary sale and such federal approval or consent was lacking.

II. The Proceedings Below And The Issues For Review

The district court granted summary judgment, holding that a 1959 federal statute commonly referred to as the "Catawba termination act," 25 U.S.C. §§ 931-938 (1976), had profoundly altered the Catawbas' legal status and, as a matter of law, precluded their claim. Accordingly, the district court held that it was not necessary to resolve the many disputed historical facts and principles of nineteenth century law raised by the respondent's claim.[7]

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[6] The Nonintercourse Act is presently codified at 25 U.S.C. § 177 (1976). The term refers to restrictions on the alienation of Indian lands contained in a series of more comprehensive acts regulating Indian affairs, each known as the "Indian Trade and Intercourse Act," first enacted in 1790 and most recently modified in 1834.

Jurisdiction in the district court was asserted pursuant to 28 U.S.C. §§ 1331, 1337 and 1361.

[7] In the courts below, the Catawbas recited in detail their version of historical events. The petitioners consistently noted throughout the proceedings that many of these matters would be sharply disputed by the petitioners, but that, for purposes of the motion for summary judgment only, the Catawbas' assertions regarding their historical factual and legal situation were assumed to be true.

In addition, the petitioners assumed, for purposes of argument only, the existence of a private right of action under the Nonintercourse Act. Similarly, the summary judgment motion did not address the question whether state law defenses had commenced to run at some earlier time, before enactment of the termination legislation, or whether state law defenses have been "borrowed" by federal law for application to land claims under the Nonintercourse Act. These issues are currently pending before this Court in County of Oneida, N.Y. v. Oneida Indians (*"Oneida"*), 719 F.2d 525 (2d Cir. 1983), *cert. granted*, 104 S.Ct. 1590 (1984) (No. 83-1065) (argued October 1, 1984). If any of these issues is resolved favorably to the petitioners in *Oneida* a remand to the court of appeals for reconsideration in light of the *Oneida* decision would appear to be appropriate.

The district court concluded that there were four independent, alternative bases for dismissal. First, it recognized that the Catawba termination act declares in plain language that state law shall apply to the Catawbas. Based on the plain language of the act, confirmed by statements in its legislative history that the purpose of the act was to give the Catawbas the same legal status, rights and obligations as other citizens, the district court held that a South Carolina statute of limitations began to run on July 1, 1962 (the undisputed effective date of the Catawba termination act) and that the ten-year statute had expired before the Catawbas brought this action in 1980.

Second, the district court held that the Catawba termination act ended any legal status the Catawbas may have had as a tribe or governmental entity within the meaning of federal laws such as the Nonintercourse Act, precluding the respondent from establishing one element of a *prima facie* case under the Nonintercourse Act, present or continuous tribal existence.

Third, the district court held that Congress retroactively ratified the 1840 treaty transfer by enacting the

Catawba termination act, precluding the respondent from establishing yet another element of a *prima facie* case under the Nonintercourse Act. The 1840 treaty was referred to in the House Committee Report for the Catawba termination act, and the act itself made provision for certain assets that the Catawbas had received as a result of the 1840 treaty. As a result, the district court held Congress to have implicitly ratified the 1840 transaction.

Fourth, the district court held that the Catawba termination act ended any trust relationship between the federal government and the Catawbas, precluding the respondent from establishing still another element of a *prima facie* case under the Nonintercourse Act. The district court based its conclusion on a number of factors. It noted that the Catawba termination act was one of a number of similar statutes passed pursuant to a federal policy to make Indians subject to the same laws as other persons and to terminate any special status the Indians may have previously held under federal law. The district court also relied upon decisions by this Court and the Ninth Circuit Court of Appeals.

The Catawbas appealed. On October 11, 1983, by a vote of two to one, a panel of the court of appeals reversed the district court and remanded for further proceedings on the merits. Declaring that "statutes that affect Indian tribes . . . should not be construed to the Indians' prejudice," the majority held: (1) that the respondent is immune from state law, including the South Carolina statute of limitations, (2) that the respondent is not precluded as a matter of law from proving that the Catawbas currently hold the status of a tribe under federal law, (3) that Congress did not ratify the 1840 treaty by enacting the 1959 legislation, and (4) that the respondent may claim a trust relationship with the federal government.

The petitioners sought and received a rehearing *en banc* which resulted in the decision of August 17, 1984.[8]

The district court's decision, the appeal, and the questions presented for this Court's review all focus on the proper construction of modern-day legislation, the Catawba termination act, 25 U.S.C. §§ 931-938 (1976). No dispute exists that this act became effective and now applies to the Catawbas. The only dispute concerns the meaning and consequent effect of the statute. Three dissenting Fourth Circuit judges and the district court viewed that legislation to make state law apply and to change the political and legal status of the Catawbas in ways that preclude them from asserting special privileges under federal law. Four Fourth Circuit judges held that the legislation had limited effect, and that the Catawbas remain cloaked with the special privileges necessary to pursue this 140-year-old claim.

REASONS FOR GRANTING THE WRIT

I. The Questions Presented Are Of Extreme Importance.

A. *If Not Reviewed Now, The Majority's Decision Will Burden 27,000 Innocent South Carolina Citizens For Years With The Threat Of Ejectment From Their Homes and Businesses.*

The respondent seeks to dispossess 27,000 innocent persons from lands which they and their predecessors have held for generations and to compel them to pay millions of dollars in damages for trespasses allegedly occurring as long as 140 years ago. The relief sought is so monumental that Judge Murnaghan called it an "impossible" remedy in his concurring opinion. By any definition, a decision having such an effect upon all land

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[8] The decision of the panel adopted by the four judges of the *en banc* court will be referred to as the "majority opinion," or "majority decision."

titles within a 225-square-mile area, is one of exceptional importance.

The respondent may argue that review should be postponed until the conclusion of all proceedings. Prompt review is required, however, not only because of the enormous interests at stake but because these 27,000 innocent landowners will suffer substantial and unnecessary harm even if they ultimately prevail on the merits or later secure review by this Court. Indian land claims are complex, involve many competing and significant interests, and are not easily or quickly litigated. For example, this Court heard argument on October 1, 1984, in *County of Oneida, New York* v. *Oneida Indians*,[9] fourteen years after the *Oneida* action was commenced. Accordingly, if review is not granted now, it may be a decade or more until this Court again has the opportunity to review the potentially dispositive issue of whether the 1959 Catawba termination act, as a matter of law, barred the action when it was commenced in 1980. During those years there will be a cloud on the land titles of whole communities, property values will be depressed, innocent citizens will be forced to defend their homes and businesses in protracted litigation at great expense, and governmental decisions will have to be based in part on speculation about how this Court might ultimately decide the issues concerning the Catawba termination act.

Judge Murnaghan's concurring opinion underscores the very real anguish and harm that delayed review could cause. He acknowledged that the dispossession of thousands of innocent parties,[10] nearly a century and a half after the allegedly invalid transaction, is a terrible,[11] but

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[9] County of Oneida, N.Y. v. Oneida Indians, 719 F.2d 525 (2d Cir. 1983), *cert. granted*, 104 S.Ct. 1590 (1984) (No. 83-1065) (argued October 1, 1984).

[10] Appendix, Ex. D, p. 30a.

[11] Appendix, Ex. D, p. 34a.

> Since the Tribe's claim . . . includes the right to actual possession, a complete victory for the Catawba Tribe would leave up

real, prospect.[12] He described the innocent landowners as bearing an "awesome risk." [13]

So "awesome" a risk ought not be lightly visited upon 27,000 landowners. Yet four federal judges have held, that as a matter of law, this claim must fail, and four have held that it may proceed. A review by this Court should not be delayed.[14]

> in the air or by the side of the road the approximately 27,000 people claiming title. . .
>
> It would indeed be tragic and unfair for the long-overdue resolution of the Catawba Tribe's claims to occur exclusively and disproportionately at the expense of the more than 27,000 innocent South Carolina citizens with claims to the contested land . . . reaching back over 140 years. By our society's general attitude, a title of that uninterrupted duration should be good against the world.

[12] Appendix, Ex. D, p. 30a.

> I . . . therefore harbor grave doubts, that, as a matter of grace, a government will rescue the current occupants of the land . . . .

[13] Appendix, Ex. D, p. 30a.

[14] Judge Murnaghan suggested in his concurring opinion that restoration of the land to the Indians was so "impossible" or unthinkable that "just compensation" from the State of South Carolina and/or the United States should be the only form of relief available to the respondent.

This suggestion of exclusive relief against the two sovereigns is, of course, only a suggestion by a single judge. Furthermore, it is of little practical benefit to the thousands of families and businesses whose lands are sought by the respondent. They have already borne an immense burden of four years of litigation and uncertain title. While the action is pending, they will continue to face awesome risks and burdens, even if they are eventually successful in defending the case on its merits or in promoting the doctrine suggested by Judge Murnaghan that it is impossible to restore lands held by innocent third parties to Indian ownership.

The petitioners joined together—private parties, local governments and the State of South Carolina—in moving for summary judgment on the basis of the Catawba termination act because that was the most efficient way to end the case entirely and to end un-

Judge Murnaghan hoped for "enlightened . . . legislative or executive action," to "rescue the current occupants of the land." [15] But that rescue will be even less likely if the Court does not now grant review. Having failed to act before,[16] Congress is unlikely to act now, when four federal judges have held the Catawbas' claim to be barred as a matter of law and four have held it to be viable. Before acting, an "enlightened" legislative or executive body may rightly demand to know whether the request is based upon legal or moral imperatives.

Another, related, consideration also compels review now. This Court consistently has recognized the importance of continuity, certainty, and stability in real property law.[17] The issues raised here have sharply, and equally, divided the eight federal judges who have considered them. Until these issues are definitively resolved by this Court, dispute and doubt will supplant certainty. To protect the public interest in the establishment of

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certainty in the region about the marketability of land titles. Many of the petitioners may have additional defenses that differ from each other. For example, in the court of appeals the private parties pointed out that the Catawbas may only have a claim against South Carolina. *See, e.g.*, Petition for Rehearing, and Suggestion of Rehearing *En Banc* (Oct. 25, 1983). But the Eleventh Amendment may shield South Carolina if it should be confronted by a requirement to raise from its citizens the staggering sums that the respondent would seek in compensation for these lands.

[15] Appendix, Ex. D, p. 30a.

[16] Several attempts to settle the Catawbas' claims by legislation have been unsuccessful. *See* The Catawba Restoration and Settlement Act, H.R. 3274, 96th Cong., 1st Sess. (1979), an act seeking to restore the Catawba Tribe of South Carolina as a federally recognized tribe and to settle all land claims of the tribe; *see also* Ancient Indian Land Claims Settlement Act of 1982, H.R. 5494, 97th Cong., 2nd Sess. (1982).

[17] *E.g.*, Nevada v. United States, —— U.S. ——, 103 S.Ct. 2906, 2918 n.10 (1983); Arizona v. California, 460 U.S. 605, 619 (1983); United States v. Title Insurance and Trust Co., 265 U.S. 472 (1924); Minnesota Co. v. National Co., 70 U.S. (3 Wall.) 332, 334 (1865).

clear and correct principles of real property law this Court should now review the questions presented.

B. *The Majority's Construction Of The Catawba Termination Act Will Create Uncertainty As To The Legal Status Of Other Indians Subject To Termination Acts.*

The Catawba termination act is not an isolated piece of legislation. A number of Indian groups were subject to legislation similar to the statute construed in this case.[18] This Court has referred to the Catawba act as

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[18] The Catawba termination act was passed during a period in the 1950's and early 1960's when Congress sought to end federal paternalism toward Indians. As Congress declared in officially adopting this policy:

> [I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship . . . .

H.R. Cong. Res. 108, 67 Stat. B132 (1953).

Pursuant to this policy, Congress passed a dozen termination acts affecting approximately 100 tribes, bands and rancherias between 1954 and 1962. Enacted termination statutes are listed in alphabetical order by the name of the terminated Indian group:

> Alabama-Coushatta, 25 U.S.C. §§ 721-727, 68 Stat. 769 (1954); California Rancheria (including a number of Indian bands), 72 Stat. 619 (1958); Catawba, 25 U.S.C. §§ 931-938, 73 Stat. 592 (1959); Klamath, 25 U.S.C. §§ 564-564x, 68 Stat. 718 (1954); Menominee, 25 U.S.C. §§ 891-902, 68 Stat. 250 (1954); Mixed-Blood Ute, 25 U.S.C. §§ 677-677aa, 68 Stat. 868 (1954); Ottawa, 25 U.S.C. §§ 841-853, 70 Stat. 963 (1956); Peoria, 25 U.S.C. §§ 821-826, 70 Stat. 937 (1956); Ponca, 25 U.S.C. §§ 971-980, 76 Stat. 429 (1962); Southern Paiute, 25 U.S.C. §§ 741-760, 68 Stat. 1099 (1954); Western Oregon (including a number of Indian bands), 25 U.S.C. §§ 691-708, 68 Stat. 724 (1954); Wyandotte, 25 U.S.C. §§ 791-807, 70 Stat. 893 (1956).

Indians in California, Oregon, Texas, Wisconsin, Utah, Oklahoma, and Nebraska, as well as South Carolina, were affected by these acts, and millions of acres of land may be the subject of ancient land claims by these Indians.

"one of a series of termination acts," [19] all of which provide for the distribution of some assets, provide that the affected Indians cease to be entitled to special services from the United States on the basis of their status as Indians, provide that federal Indian statutes no longer apply to them, and provide that state law shall apply to them in the same manner as to other persons.

As more fully discussed below, the majority opinion is not only incompatible with the explicit language of the Catawba termination act, but also reaches a result diametrically opposed to the aims of the Congress that passed such legislation, and conflicts with decisions by this Court and by other courts of appeal concerning the legal status of Indians under federal law after they become subject to a termination act.

Accordingly, if the majority opinion is not reviewed, other Indians subject to termination legislation may rely upon it to reassert special privileges under federal law and to commence land claim litigation based on ancient events.[20] This revitalization of potential claims by Indians whose special status under federal law was previously considered terminated could cloud the titles of thousands of innocent parties across the country.

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[19] *See* Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 133 n.1 (1972) (listing the Catawba act as one of several termination acts).

[20] For example, the Alabama-Coushatta Indians, the subjects of a 1954 termination act, currently have pending before the Federal Claims Court an action for damages against the United States for failing to prevent the alienation of over 17 million acres in Texas and Louisiana. Cong. Ref. No. 3-83 (Feb. 22, 1984). These terminated Indians claim a violation of the Nonintercourse Act. The decision of the Fourth Circuit majority, holding that terminated Indians can establish federal tribal status and the federal trust relationship required to bring a Nonintercourse Act claim may be argued to permit the Alabama-Coushatta Indians to bring a Nonintercourse Act claim against innocent private landowners for recovery of the land instead of, or in addition to, a damage action against the United States.

II. The Decision Of The Majority Should Be Reviewed Because It Conflicts With Decisions Of This Court And Decisions Of Other Courts Of Appeals.

A. *The Majority's Holding That State Law Does Not Apply To The Catawbas Conflicts With This Court's Holding That The Same Laws Apply To Indians Subject To Termination Legislation As To Other Persons.*

In *Affiliated Ute Citizens of Utah* v. *United States* (*"Affiliated Ute"*),[21] this Court held that Indians who are subject to termination legislation must enforce their property rights under the same laws and in the same manner as other citizens, without special privileges under federal law and without assistance from the United States.[22] The Fourth Circuit majority reached precisely the opposite conclusion, holding that the Catawbas are not subject to the same state laws as are other persons, that they are entitled to some special privileges not available to other citizens under federal statutes and that they may claim a special relationship with the United States.

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[21] Affiliated Ute Citizens of Utah v. United States (*"Affiliated Ute"*), 406 U.S. 128 (1972), *aff'd in part and rev'd in part*, Reyos v. United States (*"Reyos"*), 431 F.2d 1337 (10th Cir. 1970).

[22] *Id.* at 149-50 (1972). The termination act construed in *Affiliated Ute* terminated mixed-blood Ute Indians but did not affect full-blood members of the Ute tribe. The terminated mixed-blood Indians retained an interest in tribally-held mineral resources, but their interest was converted into shares of stock in a corporation which jointly managed those tribal resources with the unterminated members of the Ute tribe. The stock was subject to special rules regarding transfer. Eventually some terminated Indians sold their shares. There were irregularities in the sales, and the terminated Indians argued that the United States still owed them special protection. The Tenth Circuit rejected the argument and ruled that the Indians had to enforce their property rights, which were rights in tribal property, under the same securities laws as non-Indian citizens. Reyos v. United States, 431 F.2d 1337, 1343 (10th Cir. 1970). This Court affirmed. *Affiliated Ute*, 406 U.S. 128, 144-50 (1972).

The majority achieved their anomalous result by failing even to mention this Court's decision in *Affiliated Ute*, much less attempting to reconcile their decision with it. The dissenting judges, in contrast, recognized that *Affiliated Ute* governs this case and that the majority's analysis squarely conflicts with *Affiliated Ute*.[23] This irreconcilable conflict with a controlling decision by this Court warrants review.

Moreover, the Fourth Circuit majority's opinion also ignores, and is in conflict with, declarations by this Court that state law applies to Indians who are subject to termination legislation. In *Bryan* v. *Itasca County, Minnesota* (*"Bryan"*),[24] this Court noted that a termination act is an explicit congressional direction that state law shall apply to the affected Indians. Comparing the explicit language of the termination acts to more general legislation extending only limited state jurisdiction over Indians, the Court declared in *Bryan*:

> [T]ermination Acts [are] . . . cogent proof that Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws and state taxation.[25]

Similarly, in *United States* v. *Antelope* (*"Antelope"*),[26] this Court declared that, although non-terminated Indians are subject to the federal Major Crimes Act, terminated Indians are subject to state criminal laws.

Finally, review is required because the majority's decision that state law does not apply to the Catawbas directly conflicts with two decisions by the Ninth Circuit.

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[23] Appendix, Ex. C, p. 27a.

[24] Bryan v. Itasca County, Minnesota (*"Bryan"*), 426 U.S. 373 (1976).

[25] *Id.* at 389.

[26] United States v. Antelope (*"Antelope"*), 430 U.S. 641, 647 n.7 (1977).

In *United States* v. *Heath* (*"Heath"*), the Ninth Circuit declared:

> [Terminated Indians] are subjected to state laws and are to be dealt with by the law no differently than any other citizen of a state.[27]

So, too, in *Taylor* v. *Hearne*,[28] the Ninth Circuit affirmed the dismissal of an action brought by a terminated Indian to recover land once a part of the Auburn Rancheria. The court ruled that a state statute providing for the sale of land to the state by operation of law for nonpayment of taxes applied to the terminated Indian and the property at issue.

B. *The Majority's Decision Conflicts With Decisions Of This Court And Of Other Courts Of Appeals Which Hold That State Statutes Of Limitations Begin To Run Against Indians Once They No Longer Hold A Special Legal Status Under Federal Law.*

This Court long ago established that state statutes of limitations and related equitable doctrines of repose begin to run against Indians once their special status under federal law is gone. In *Schrimpscher* v. *Stockton* (*"Schrimpscher"*)[29] this Court held that an action by Wyandotte Indians to recover land was barred by state statutes of limitations, rejecting the argument that state statutes of limitations do not run against Indians. In-

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[27] United States v. Heath (*"Heath"*), 509 F.2d 16, 19 (9th Cir. 1974). In *Heath*, a Klamath Indian argued that she had been erroneously charged with murder under a federal statute applying to crimes committed by Indians because the Klamath termination act had rendered the statute inapplicable to her. The Ninth Circuit agreed that termination had removed her from the category of persons covered by that act, but found another basis for jurisdiction.

[28] Taylor v. Hearne, 637 F.2d 689 (9th Cir.), *cert. denied*, 454 U.S. 851 (1981).

[29] Schrimpscher v. Stockton (*"Schrimpscher"*), 183 U.S. 290 (1902).

stead, the Court ruled that state law—including the statutes of limitations—had become applicable because of a treaty containing language which is substantially the same as Section 5 of the Catawba termination act. The Catawba act directs that "the laws of the several states shall apply to them in the same manner they apply to other[s]." The treaty provided that the Wyandotte Indians "shall in all respects be subject to the laws of the United States, and of the Territory of Kansas, in the same manner as other citizens of said Territory. . . ." After the removal of any federal restraint upon the alienation of the Indians' land, this Court held that the language of the treaty caused the state statutes of limitations to begin to run.[30]

The Ninth and Tenth Circuit Courts of Appeals have properly followed *Schrimpscher* and *Dillon* v. *Antler Land Co.*,[31] Indian land was transferred in violation of a federal restriction on alienation. After the transfer, Congress removed the restriction and directed that state law apply. The Ninth Circuit held that the state statute of limitations began to run at the time state law was made applicable, and barred the claims. Similarly, in *Dennison* v. *Topeka Chambers Industrial Development Corp.*[32] the Tenth Circuit held that the state statute of limitations barred a claim that Indian property had been conveyed in violation of federal restrictions against alienation. The court declared that the statute of limitations began

[30] *Id.* at 297. *See also* Dickson v. Luck Land Co., 242 U.S. 372 (1917). Similarly, in Felix v. Patrick (*"Felix"*), 145 U.S. 317 (1892), this Court held that once an Indian was able to sue on her own behalf and was no longer subject to special restrictions, laches began to run against her.

[31] Dillon v. Antler Land Co. (*"Dillon"*), 341 F. Supp. 734 (D. Mont. 1972), *aff'd*, 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975).

[32] Dennison v. Topeka Chambers Indus. Dev. Corp. (*"Dennison"*), 527 F. Supp. 611 (D. Kan. 1981), *aff'd*, 724 F.2d 869 (10th Cir. 1984).

to run once federal restrictions on transfer were removed and state law became applicable.

The decisions of this Court and of the Ninth and Tenth Circuits recognize that any Indian immunity from state statutes of limitations is dependent upon special legal status under federal law. The Fourth Circuit majority, in contrast, refused to acknowledge that any Indian immunity from state law defenses such as statutes of limitations is a privilege conferred only by a special legal status under federal law and is subject to termination. Instead, the opinion mistakenly applied *Menominee Tribe of Indians* v. *United States* (*"Menominee"*)[33] to this case. The *Menominee* decision addressed whether Congress had intended by a termination act to abrogate a *treaty* right, which the Menominees held under a treaty with the United States and which they had never conveyed away. The Catawbas, in contrast, never had any treaty-based right to be free from the operation of state law, and made a voluntary sale of land held under a treaty with Great Britain which in no way prohibited the sale. *Menominee* is, therefore, wholly inapplicable.

C. *The Majority's Construction Of The Statute Conflicts With This Court's Direction That The Language Of A Statute Is The Best Evidence Of Congressional Intent And Misstates The Canons Of Construction For Statutes Affecting Indians.*

This Court has repeatedly declared that the aim of a court in construing a statute must be to determine and give effect to the intent of the legislative body that enacted the legislation.[34] The language of the statute is

[33] Menominee Tribe v. United States (*"Menominee"*), 391 U.S. 404 (1968).

[34] *E.g.*, United States v. First National Bank, 234 U.S. 245 (1914); Adams v. Morton, 581 F.2d 1314, 1320 (9th Cir. 1978), *cert. denied sub nom.* Gros Ventre Tribe v. United States, 440 U.S. 958 (1979) ("The court's first duty in construing the statute is to effectuate the expressed intent of Congress.")

the primary evidence of congressional intent,[35] and where that language is plain a court may not alter its meaning by resort to canons of construction for ambiguous statutes.[36] If a court finds it necessary to go beyond the statute itself to understand what Congress intended, it must examine the surrounding circumstances.[37] Such an examination must explore the entire context, not selected portions of the legislative history,[38] and must ultimately be focused on the intent of the legislature at the time the legislation was enacted.[39] A court cannot rewrite a congressional act by its "interpretation." [40]

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[35] *E.g.*, Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330 (1978); United States v. Ray, 488 F.2d 15, 18 (10th Cir. 1973) ("It is a cardinal tenet of statutory construction that statutes are to be construed to effectuate the intent of the enacting body, and that in construing a statute, the court first looks to the language of the statute."); Hodgson v. Mauldin, 344 F. Supp. 302, 307 (N.D. Ala. 1972), *aff'd sub nom.* Brennan v. Mauldin (*"Mauldin"*), 478 F.2d 702 (5th Cir. 1973).

[36] *Mauldin*, 344 F. Supp. 302, 307 (N.D. Ala. 1972).

[37] *E.g.*, Leo Sheep Co. v. United States, 440 U.S. 668 (1979); Rosebud Sioux Tribe v. Kneip, 521 F.2d 87 (8th Cir. 1975).

[38] Solem v. Bartlett, —— U.S. ——, 104 S.Ct. 1161 (1984); Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294 (1933). *Accord*, United Shoe Workers, AFL-CIO v. Bedell, 506 F.2d 174, 179 (D.C. Cir. 1974).

[39] Andrus v. Glover Constr. Co., 446 U.S. 608, 619 (1980), quoting DeCoteau v. Dist. County Court, 420 U.S. 425, 447 (1975). *See also* Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 353 (1945) (subsequent history omitted). *Accord*, Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943).

[40] United States v. Hoodie, 588 F.2d 292, 295 (9th Cir. 1978). In rejecting the district court's determination that assimilationist legislation had been implicitly repealed by pro-Indian changes in public policy, the appellate court stated:

> [I]t is apparent that the district court was guided largely by its perception that Congress has become increasingly solicitous of Indian rights and that its holding would favor such rights.

The majority's decision violates every one of these well-established principles of statutory construction. Instead of focusing on the explicit language of the act, the majority opinion begins with, and relies upon, a serious misstatement of the law concerning the construction of ambiguous statutes involving Indians. The opinion declares that statutes that affect Indian tribes "should not be construed to the Indians' prejudice." [41] That is not the law. Special canons of construction favoring Indians *only* come into play if, after examination of the language of the statute to be construed, the legislative history, administrative interpretation and the full context, it is still uncertain what Congress intended.[42] As this Court said only last term in *Rice* v. *Rehner*:

> [W]e have consistently refused to apply such a canon of construction [favoring Indians] when application would be tantamount to a formalistic disregard of congressional intent.[43]

In this case there is no uncertainty. The statute directs that state law shall apply to the Catawbas, and

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> In another context, however, the Supreme Court [has] admonished:
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> > [A] statute "is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes." [Citations omitted.]

[41] Appendix, Ex. B, p. 13a.

[42] *E.g.*, Lower Brule Sioux Tribe v. United States, 712 F.2d 349, 352 (8th Cir. 1983) ("[A]n examination of the legislative history and circumstances surrounding the enactment of a statute may reveal Congressional intent and resolve the ambiguity, obviating resort to these rules.").

[43] Rice v. Rehner (*"Rice"*), —— U.S. ——, 103 S.Ct. 3291, 3302 (1983). Similarly, *see* Escondido Mut. Water Co. v. LaJolla (*"Escondido"*), —— U.S. ——, 104 S.Ct. 2105, 2110 (1984) ("[I]t should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses. . . .").

legislative history confirms that the purpose of the act was to give the Catawbas the same legal status as others.[44]

The majority refused to give effect to the plain language of Section 5 of the act, which specifies, "the laws of the several States shall apply to them [the Catawbas] in the same manner [as to others]." Instead, they concluded that "The 1959 Act neither prohibits nor authorizes the application of state law . . . ."

The majority attempted to justify this contradiction on the basis of Section 6 of the Catawba termination act which provides "that nothing in the Act shall affect the rights, privileges, or obligations of the Tribe *under the laws of South Carolina.*" [45] The majority suggested that Section 6 somehow eliminated the command in Section 5 that state law shall apply to the Catawbas. That construction is wrong for three reasons. First, it renders meaningless the explicit and unqualified directive in Section 5 that state law shall apply to the Catawbas. The customary rule of statutory construction is to avoid an interpretation that renders a portion of the statute meaningless.[46] Second, the majority confused special status under state law,[47] which was preserved by Section 6, with

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[44] As the dissenting judges below pointed out:

> [T]he central purpose of the Catawba Act was to terminate federal responsibility to the Tribe and its members. Partial termination was specifically rejected by the bill's sponsor . . . . [T]he plain and far-reaching language of the Act clearly reflects congressional intent to terminate any special federal status the Catawbas may previously have held and to put them on an equal footing with other citizens.

Appendix, Ex. C, p. 25a.

[45] Appendix, Ex. B, p. 18a (emphasis supplied).

[46] *See, e.g.*, Gen. Motors Acceptance Corp. v. Whisnant, 387 F.2d 774, 778 (5th Cir. 1968).

[47] The Catawbas still retain approximately 630 acres which have been held in trust for them by the State of South Carolina since 1842. The state has borne responsibility for this property and has also appropriated monies for the maintenance and support of the Catawbas over the years. Section 6 both preserved any special relationship between the Catawbas and the state and assured that the Catawbas could bring claims under state law relating to that relationship.

special status under federal law (such as any federally-based immunity from state law defenses), which was eliminated by Section 5 of the act. Section 6 only speaks of, and preserves, any special rights under *state* law, *not federal* law. Thus, Section 6 is irrelevant to questions concerning the Catawbas' status under federal law. Third, even if Section 6 somehow superseded Section 5 of the act, by its language Section 6 subjects the Catawbas to the "obligations" of South Carolina law. South Carolina obligates all its citizens to bring claims within the statute of limitations period.

The majority also read into Section 6 an intent to preserve this claim under federal law by referring to a single expression by the Catawbas of a desire that any claim they might have against the State of South Carolina not be affected.[48] The majority concluded that such a desire somehow resulted in the preservation of a federal Nonintercourse Act claim against all public and private present owners of the land. Ironically, in the district court the respondent argued that Congress was aware only of a possible state law claim that the State had not fully performed the terms of the 1840 treaty. The provisions of Section 6 that the Catawbas' rights and obligations under state law were not affected by the Catawba termination act was an appropriate response by Congress.

What Congress did not do was to preserve any federal claim such as a Nonintercourse Act claim. Congress knew how to preserve federal claims when it desired to do so and demonstrated its ability in other termination acts passed before and after the Catawba termination act.[49] It did not do so here.

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[48] This expression by the Catawbas was made prior to the drafting of the legislation. More significant is the Catawbas' vote to accept the legislation after it was enacted without reference to any claim under federal law.

[49] *See, e.g.*, 25 U.S.C. §§ 677r, 706 and 976 (1976).

In sum, there is no internal inconsistency or ambiguity in the statute, and there is no justification for construing the Catawba termination act to mean something different from what it plainly says in Section 5. State law applies to the Catawbas.

D. *The Majority Interpreted The Meaning Of The Word "Indians" In A Way That Conflicts With This Court's Construction Of The Language Of Indian Statutes And Defies The Rules Of English Grammar.*

The majority conceded that enactment of 25 U.S.C. § 935 terminated the federal government's trust responsibilities to individual Catawbas. Paradoxically the majority opinion nevertheless concluded that the Catawbas as a group or tribe could still assert a federal trust responsibility relationship that would exempt them from state law defenses and would permit them to bring a Nonintercourse Act claim.[50]

No such distinction appears in the statute. To the contrary, the statute plainly applies to the Catawbas both individually and collectively. It provides:

> [T]he tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them. . . .[51]

The statute thus explicitly declares that neither the tribe nor its members are entitled to special services or the protection of special statutes based upon their status *as Indians*, using the term "Indians" interchangeably with the terms "tribe and its members." [52]

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[50] Appendix, Ex. B, p. 23a.

[51] 25 U.S.C. § 935 (1976).

[52] Congress' use in Section 935 of the uniform shorthand reference to "all statutes of the United States that affect Indians because of their status as Indians" was the natural method of insuring that

The majority's construction of the statute as somehow exempting the Catawbas collectively from the effects of the statute is not even grammatically possible. The second sentence of Section 5 of the Catawba termination act is a compound sentence composed of three independent principal clauses. "The tribe and its members" are the subject of the sentence, and its provisions set forth what happens to them, as the subject of the sentence. References to "them" are references to the subject of the sentence, "the tribe and its members." In simplified form, the sentence reads:

> [T]he tribe and its members shall not be entitled to any of the special services . . . for Indians because of their status as Indians, all [federal Indian] statutes shall be inapplicable to them; and [state law] shall apply to them . . . .

The statute's use of the term "them" thus is not and cannot be limited to individual members of the tribe.

Perhaps because the plain language of the Catawba termination act contradicts their construction of the act, the majority attempted to bolster their construction by asserting that the 1834 Nonintercourse Act uses the term "Indians" only to refer to individual Indians and not Indian tribes. They then concluded that the Congress that passed the 1959 Catawba termination act must have known of and employed the same purported distinction.[53]

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every statute relating to Indian affairs was no longer applicable to the tribe and its members. It is a person's status as a member of a tribe, not his racial or anthropological heritage, which qualifies that person for "status as [an] Indian," United States v. Antelope, 430 U.S. 641, 645-47, and n.7 (1977), and it is from that status that all federal legislative power springs. *Id.*, and art. I, § 8 of the Constitution of the United States. Rendering inapplicable all statutes of the United States passed pursuant to that power and as a result of that status ensures that the full range of United States statutes were no longer applicable to "the tribe and its members."

[53] Appendix, Ex. B, pp. 20a-21a.

In fact there is no such distinction in the Nonintercourse Act. The Nonintercourse Act, 25 U.S.C. § 177, uses the term "Indians" interchangeably with the terms "Indian nation" and "tribe of Indians."[54] Moreover, in *Wilson* v. *Omaha Indian Tribe*[55] this Court declared that "Indians" and "Indian tribes" mean the same thing in the Trade and Intercourse Act, of which the Nonintercourse Act is a part. Thus, neither English grammar nor the purported distinction in the language of the Nonintercourse Act permits the majority's construction of the Catawba termination act.

E. *The Majority Substituted Their Judgment For That Of Congress, In Conflict With Decisions Of This Court And Other Courts Of Appeals.*

The majority's opinion conflicts with yet another series of decisions by this Court. This Court has repeatedly held that Congress, and Congress alone, has paramount power to create or to end any special legal status In-

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[54] The first sentence of this statute requires that a land transfer by any "Indian nation or tribe of Indians" be conducted pursuant to treaty. The second sentence imposes a fine on any person who negotiates a transfer from an Indian nation or tribe without federal authority. The third sentence, however, permits a representative of a state, accompanied by a federal commissioner, to negotiate a transfer of land by a treaty "with Indians" and to compensate "the Indians." The third sentence modifies the provisions of the first and second sentences for dealing with Indian tribes, describing the one circumstance in which a state may treat with a tribe. It merely substitutes the term "Indians" for "tribes." Indeed, the third sentence only makes sense if the term "Indians" means "Indian tribes," since the federal government did not negotiate treaties with individual Indians, and since Indians commonly held land collectively as a tribe, not as individuals. Thus, contrary to the assertion of the majority opinion, the Nonintercourse Act uses these words interchangeably.

[55] Wilson v. Omaha Indian Tribe, 442 U.S. 653, 665-66 (1979) (subsequent history omitted). *See also* Mohegan Tribe v. Connecticut, 638 F.2d 612, 627 n.18 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

dians may enjoy under federal law.[56] As the Court declared in *United States* v. *Waller* ("*Waller*"):

> Congress may relieve the Indians from such guardianship and control, in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property or give to them a partial emancipation if it thinks that course better for their protection.[57]

Similarly, this Court said in *Rice* v. *Rehner* less than two years ago:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.[58]

Indeed, this Court's decision in *Affiliated Ute*,[59] affirmed the Tenth Circuit's position in *Reyos*:[60]

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[56] *See, e.g.*, United States v. Antelope, 430 U.S. 641, 646 (1977); United States v. Seminole Nation, 299 U.S. 417, 428-29 (1937); United States v. Nice, 241 U.S. 591, 598 (1916); United States v. Kagama, 118 U.S. 375 (1886).

[57] United States v. Waller, 243 U.S. 452, 459 (1917).

[58] *Rice v. Rehner* ("*Rice*"), —— U.S. ——, 103 S.Ct. 3291, 3295 (1983), *quoting* United States v. Wheeler, 435 U.S. 313, 323 (1978) (emphasis added by the Court in *Rice*). *See also* DeCoteau v. Dist. County Court, 420 U.S. 425 (1975); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Martone, *American Indian Tribal Self-Government In the Federal System: Inherent Right or Congressional License?*, 51 Notre Dame L.Rev. 600, 611 (1976).

Other recent decisions by this Court are in accord. In Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973) and Kake Village v. Egan, 369 U.S. 60 (1962) this Court emphasized: (1) that historical traditions of Indian immunity from state law have diminished in importance since the late nineteenth century, and (2) that what is crucial in determining whether Indians are immune from state law is whether federal law has forbidden the application of state law to them. In this case Congress has not only *not forbidden* the application of state law to the Catawbas, but has *affirmatively directed that state law shall apply.*

[59] *Affiliated Ute*, 406 U.S. 128, 144-50 (1972).

[60] *Reyos*, 431 F.2d 1337 (10th Cir. 1970).

> [I]t is not for administrative officials or for the courts to modify this statutory termination by the creation of some status lying between wardship and complete termination.[61]

Despite this Court's directives, the majority reached a result that is contrary to the explicit language of the Catawba termination act declaring that state law shall apply to the Catawbas and that federal Indian statutes and special Indian services shall not. By ignoring the language of the act, substantial portions of the legislative history,[62] administrative interpretation,[63] and con-

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[61] *Reyos*, 431 F.2d at 1343. This Court also has cited the Ninth Circuit's decision in *Heath* with approval in United States v. Antelope, 430 U.S. 631, 647 n.7 (1977). In *Heath*, the Ninth Circuit plainly stated:

> The Klamath Termination Act . . . was intended to end the special relationship that had historically existed between the Federal Government and the Klamath Tribe. While anthropologically a Klamath Indian even after the Termination Act obviously remains an Indian, his unique status vis-a-vis the Federal Government no longer exists.

Heath, 509 F.2d at 19.

[62] For example, the sponsor of the bill that became the Catawba termination act firmly announced in congressional debate:

> It is my purpose to put these people and their land on an even keel, an even station, with other citizens of the United States.

105 Cong. Rec. 5462 (1959).

In hearings on the legislation he reiterated:

> They need it [the legislation] to put them on the same status as other citizens with the same responsibilities.

Hearings on H.R. 6128 before the House Committee on Interior and Insular Affairs, 86th Cong., 1st Sess. 10 (1959) (unpublished).

[63] For example, in supporting the legislation, the Department of the Interior and its Bureau of Indian Affairs stated that one of the effects of the bill would be to "discontinue their [the Catawbas'] special Indian relations with the Federal government." Department of the Interior, BIA Press Release (June 10, 1959); (Def. Ex. 23) (Appeals Record at 510). *See also* Def. Exs. 28, 30 (Appeals Record

temporary federal Indian policy,[64] the majority substituted *its* preferred form of a Catawba termination act for the statute enacted by Congress. As Judge Hall declared, writing in dissent:

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at 523, 524). The Office of the Solicitor of the Department of the Interior explained the termination act to the Catawbas in a 1959 letter:

> Section 5 invokes the tribal constitution which means that the tribe will no longer exist as a Federally recognized organization. . . . [T]he "tribe" no longer will be a legal entity which will be governed by Federal laws which refer to "tribes" . . . . Nothing in the act prohibits those interested in organizing under State law to carry on any of the nongovernmental activities of the group.

Def. Ex. 29 (Appeals Record at 531).

Current regulation provides that groups of Indians who have been the subject of termination legislation cannot be recognized or treated as Indian tribes under federal law. 25 C.F.R. § 83.3(3) (1982). Instead, where a terminated group of Indians has sought to revive their special status under federal law, Congress has enacted legislation restoring that group to the status of an Indian tribe under federal law. *See, e.g.*, Paiute Indian Tribe of Utah Restoration Act, 25 U.S.C. §§ 761-768 (1980). The Catawbas have never been the subject of such "restoration" legislation and are still listed in the records of the Bureau of Indian Affairs as a terminated group of Indians. Def. Ex. 39 (Appeals Record at 551).

[64] It has been widely recognized that termination acts changed the legal status of the affected Indians. Federal Indian law specialist Charles F. Wilkinson described the purpose and effect of termination legislation:

> Termination, the official Federal Indian Policy from 1953 through the late 1960's may be defined simply as the cessation of the Federal-Indian relationship, whether that relationship was established through treaty or otherwise. The thrust was to eliminate the reservations and to turn Indian affairs over to the states. Indians would become subject to state control without any Federal support or restrictions. Indian land would no

> [T]he majority in this case has impermissibly substituted its own judgment for that of Congress. By doing so, it has succeeded in nullifying the clear mandate of the Catawba Act . . . .[85]

This Court should review and correct the majority decision because it rewrites the Catawba termination act, a clearly legislative function.

CONCLUSION

The majority decision repeatedly and significantly conflicts with decisions by this Court and by other courts of appeals. Because the homes and businesses of thousands of innocent parties are at stake, and because the decision below also could create confusion and uncertainty as to the legal status of other Indians, this Court should now review and correct the decision below. Correction of the majority's errors a decade from now can never ameliorate years of real anguish for thousands of innocent landowners.

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longer be held in trust and would be fully taxable and alienable, just like non-Indian land in the states.

Wilkinson, The Passage of The Termination Legislation, in Final Report To The American Indian Policy Review Commission, in Task Force Ten, *Report On Terminated And Nonfederally Recognized Indians*, 1627-49 (October 1976, U.S. Gov't Printing Office).

[85] Appendix, Ex. C, p. 28a.

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November 14, 1984

APPENDIX

EXHIBIT A

The Per Curiam Decision Of The Fourth Circuit Sitting En Banc

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1671

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, also known as the Catawba Nation of South Carolina,
Appellant,

—v—

STATE OF SOUTH CAROLINA, RICHARD W. RILEY, as Governor of the State of South Carolina; COUNTY OF LANCASTER, and its COUNTY COUNCIL consisting of FRANCIS L. BELL as Chairman, FRED E. PLYLER, ELDRIDGE EMORY, ROBERT L. MOBLEY, BARRY L. MOBLEY, L. EUGENE HUDSON, LINDSAY PETTUS; CITY OF ROCK HILL, J. EMMETT JEROME, as Mayor, and its CITY COUNCIL consisting of MELFORD A. WILSON, ELIZABETH D. RHEA, MAXINE GILL, WINSTON SEARLES, A. DOUGLAS ECHOLS, FRANK W. BERRY, SR.; BOWATER NORTH AMERICAN CORPORATION; CATAWBA TIMBER CO.; CELANESE CORPORATION OF AMERICA; CITIZENS AND SOUTHERN NATIONAL BANK OF SOUTH CAROLINA; CRESENT LAND & TIMBER CORP.; DUKE POWER COMPANY; FLINT REALTY AND CONSTRUCTION COMPANY; HERALD PUBLISHING COMPANY; HOME FEDERAL SAVINGS AND LOAN ASSOCIATION; ROCK HILL PRINTING & FINISHING COMPANY; RODDEY ESTATES, INC.; SOUTHERN RAILWAY COMPANY; SPRINGS MILLS INC.; J.P. STEVENS & COMPANY; TEGA CAY ASSOCIATES; WACHOVIA BANK AND TRUST COMPANY; ASHE BRICK COM-

PANY; CHURCH HERITAGE VILLAGE & MISSIONARY FELLOWSHIP; NISBET FARMS, INC.; C. H. ALBRIGHT; NED ALBRIGHT; J. W. ANDERSON, JR.; JOHN MARSHALL WI[illegible]KINS, II; JESSE G. ANDERSON; JOHN WESLEY AN[illegible]RSON; DAVID GOODE ANDERSON; W. B. ARDREY, JR. ELIZA BETH ARDREY GRIMBALL; JOHN W. ARDREY, ARDREY FARMS; F. S. BARNES, JR.; W. WATSON BARRON; WILSON BARRON; ARCHIE B. CARROLL, JR.; HUGH WILLIAM CLOSE; JAMES BRADLEY; FRANCIS LAY SPRINGS; LILLIAN CRANDEL CLOSE; FRANCIS ALLISON CLOSE; LEROY SPRINGS CLOSE; PATRICIA CLOSE; WILLIAM ELLIOTT CLOSE; HUGH WILLIAM CLOSE, JR.; ROBERT A. FEWELL; W. J. HARRIS; ANNIE F. HARRIS; T. W. HUTCHINSON; HIRAM HUTCHINSON, JR.; J. R. MCALHANEY; F. M. MACK, JR.; ARNOLD F. MARSHALL; J. E. MARSHALL, JR.; C. E. REID, JR.; WILL R. SIMPSON; JOHN S. SIMPSON; ROBERT F. SIMPSON; THOMAS BROWN SNODGRASS, JR.; JOHN M. SPRATT; MARSHALL E. WALKER; HUGH M. WHITE, JR.; JOHN M. BELK; JANE NISBET GOODE; R. N. BENCHER; W. O. NISBET, III; PAULINE B. GUNTER; J. MAX MINSON; W. A. MCCORKLE; MARY MCCORKLE; WILLIAM O. NISBET; EUGENIA NISBET WHITE; MARY NISBET PURVIS; E. N. MARTIN; ROBERT M. YODER,

Appellees.

Appeal from the United States District Court for the District of South Carolina, at Rock Hill. Joseph P. Wilson, Senior District Judge, Western District of Pennsylvania, sitting by designation. (C/A 80-2050)

Argued June 4, 1984 Decided August 17, 1984

Before WINTER, Chief Judge, WIDENER, HALL, PHILLIPS, MURNAGHAN, and SPROUSE, Circuit Judges, and BUTZNER, Senior Circuit Judge. (en banc)*

Don B. Miller and Jean H. Toal (Native American Rights Fund; Belser, Baker, Barwick, Ravenel, Toal & Bender; Robert M. Jones; Mike Jolly and Richard Steele on brief) for appellant; John C. Christie, Jr., J. D. Todd, Jr., James D. St. Clair (J. William Hayton, Stephen J. Landes, Lucinda O. McConathy, Bell, Boyd & Lloyd; Michael J. Giese, Gwendolyn Embler, Leatherwood, Walker, Todd & Mann; Dan M. Byrd, Jr., Mitchell K. Byrd, Byrd and Byrd; James L. Quarles, III; William F. Lee; David H. Erichsen; Hale and Dorr; T. Travis Medlock, Attorney General, Kenneth P. Woodington, Assistant Attorney General for the State of South Carolina on brief) for appellees.

PER CURIAM:

The judgment of the district court is reversed, and this case is remanded for further proceedings for reasons stated in the opinion of the panel. Catawba Indian Tribe of South Carolina v. South Carolina, 718 F.2d 1291 (4th Cir. 1983). Judge Widener, Judge Hall, and Judge Phillips, dissenting, would affirm the judgment of dismissal for the reasons stated in Judge Hall's dissent to the panel opinion. 718 F.2d at 1301-03.

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* Judge Russell, Judge Ervin, and Judge Chapman did not participate in the hearing or the decision of this appeal.

EXHIBIT B

The Panel Majority Opinion

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1671

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, also known as the Catawba Nation of South Carolina,
Appellant,

—v—

STATE OF SOUTH CAROLINA, RICHARD W. RILEY, as Governor of the State of South Carolina; COUNTY OF LANCASTER, and its COUNTY COUNCIL consisting of FRANCIS L. BELL as Chairman, FRED E. PLYLER, ELDRIDGE EMORY, ROBERT L. MOBLEY, BARRY L. MOBLEY, L. EUGENE HUDSON, LINDSAY PETTUS; CITY OF ROCK HILL, J. EMMETT JEROME, as Mayor, and its CITY COUNCIL consisting of MELFORD A. WILSON, ELIZABETH D. RHEA, MAXINE GILL, WINSTON SEARLES, A. DOUGLAS ECHOLS, FRANK W. BERRY, SR.; BOWATER NORTH AMERICAN CORPORATION; CATAWBA TIMBER CO.; CELANESE CORPORATION OF AMERICA; CITIZENS AND SOUTHERN NATIONAL BANK OF SOUTH CAROLINA; CRESENT LAND & TIMBER CORP.; DUKE POWER COMPANY; FLINT REALTY AND CONSTRUCTION COMPANY; HERALD PUBLISHING COMPANY; HOME FEDERAL SAVINGS AND LOAN ASSOCIATION; ROCK HILL PRINTING & FINISHING COMPANY; RODDEY ESTATES, INC.; SOUTHERN RAILWAY COMPANY; SPRINGS MILLS INC.; J.P. STEVENS & COMPANY; TEGA CAY ASSOCIATES; WACHOVIA BANK AND TRUST COMPANY; ASHE BRICK COMPANY; CHURCH HERITAGE VILLAGE & MISSIONARY FELLOWSHIP; NISBET FARMS, INC.; C. H. ALBRIGHT; NED ALBRIGHT; J. W. ANDERSON, JR.; JOHN MARSHALL WILKINS, II; JESSE G. ANDERSON; JOHN WESLEY ANDERSON; DAVID GOODE ANDERSON; W. B. ARDREY, JR.; ELIZA BETH ARDREY GRIMBALL; JOHN W. ARDREY, ARDREY FARMS; F. S. BARNES, JR.; W. WATSON BARRON; WILSON BARRON; ARCHIE B. CARROLL, JR.; HUGH WILLIAM CLOSE; JAMES BRADLEY; FRANCIS LAY SPRINGS; LILLIAN CRANDEL CLOSE; FRANCIS ALLISON CLOSE; LEROY SPRINGS CLOSE; PATRICIA CLOSE; WILLIAM ELLIOTT CLOSE; HUGH WILLIAM CLOSE, JR.; ROBERT A. FEWELL; W. J. HARRIS; ANNIE F. HARRIS; T. W. HUTCHINSON; HIRAM HUTCHINSON, JR.; J. R. MCALHANEY; F. M. MACK, JR.; ARNOLD F. MARSHALL; J. E. MARSHALL, JR.; C. E. REID, JR.; WILL R. SIMPSON; JOHN S. SIMPSON; ROBERT F. SIMPSON; THOMAS BROWN SNODGRASS, JR.; JOHN M. SPRATT; MARSHALL E. WALKER; HUGH M. WHITE, JR.; JOHN M. BELK; JANE NISBET GOODE; R. N. BENCHER; W. O. NISBET, III; PAULINE B. GUNTER; J. MAX MINSON; W. A. MCCORKLE; MARY MCCORKLE; WILLIAM O. NISBET; EUGENIA NISBET WHITE; MARY NISBET PURVIS; E. N. MARTIN; ROBERT M. YODER,
Appellees.

Appeal from the United States District Court for the District of South Carolina, at Rock Hill. Joseph P. Wilson, Senior District Judge, Western District of Pennsylvania, sitting by designation.

Argued March 8, 1983 Decided October 11, 1983

Before HALL and SPROUSE, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Don B. Miller, Native American Rights Fund; Jean H. Toal (Belser, Baker, Barwick, Ravenel, Toal & Bender; Robert M. Jones; Mike Jolly and Richard Steele on brief) for appellant; James D. St. Clair (James L. Quarles, III, William F. Lee, David H. Erichsen, Hale and Dorr on brief) and [illegible]n C. Christie, Jr. (J. William Hayton, Stephen J. Landes, Lucinda O. McConathy, Bell, Boyd & Lloyd; J. D. Todd, Jr., Michael J. Giese, Gwendolyn Embler, Leatherwood, Walker, Todd & Mann; Dan M. Byrd, Jr., Mitchell K. Byrd, Byrd and Byrd; T. Travis Medlock, Attorney General, Kenneth P. Woodington, Assistant Attorney General, State of South Carolina on brief) for appellees.

BUTZNER, Senior Circuit Judge:

The Catawba Indian Tribe of South Carolina appeals from the district court's grant of summary judgment in favor of South Carolina and 76 other defendants.[1] The court held that the Catawba Indian Tribe Division of Assets Act, 25 U.S.C. §§ 931-38, and the South Carolina statute of limitations, S.C. Code Ann. § 15-3-340 (Law. Co-op. 1976), barred the Tribe's claim to land allegedly granted to the state in 1840 in violation of the Indian Nonintercourse Act, 25 U.S.C. § 177. We reverse and remand for further proceedings on the merits of the Tribe's claim. We hold only that the grant of summary judgment cannot be sustained. For the purpose of ruling whether summary judgment was appropriate, we have

[1] For convenience, we will refer to the appellees collectively as South Carolina.

assumed without deciding, as did the district court, that disputed facts on which the Tribe relies are true.

I

Long before English and European settlers came to North America, the Catawba Tribe occupied its aboriginal territory in what is now parts of North and South Carolina. In the 1760 Treaty of Pine Tree Hill between the Tribe and the King of England's Superintendent for Indian Affairs, the Tribe relinquished its aboriginal territory in exchange for being quietly and permanently settled on a 144,000 acre tract.

The Tribe protested that England had failed to carry out the terms of the 1760 treaty and reasserted a right to its aboriginal territory. In 1763, the Tribe entered into the Treaty of Augusta with the King's representatives. In exchange for relinquishing its aboriginal territory, the Tribe again agreed to be settled on a 144,000 acre tract in South Carolina.[2] England fulfilled the terms of this treaty.

After the Revolutionary War, South Carolina initially recognized the Treaty of Augusta. There was increasing

[2] The 1763 Treaty of Augusta provides in relevant part:

> And We the Catawba Head Men and Warriors in Confirmation of an Agreement heretofore entered into with the White People declare that we will remain satisfied with the Tract of Land of Fifteen Miles square a Survey of which by our consent and at our request has been already begun and the respective Governors and Superintendent on their Parts promise and engage that the aforesaid survey shall be compleaed and that the Catawbas shall not in any respect be molested by any of the King's subjects within the said Lines but shall be indulged in the usual Manner of hunting Elsewhere.

XI *Colonial Records of North Carolina*, at 201-02. The tract lies at the northern border of South Carolina in York, Lancaster, and perhaps Chester counties. The precise boundaries are uncertain because of the deficiencies of the survey.

pressure from settlers, however, who wished to move onto the Tribe's land. By the 1830s, nearly all of the Tribe's land had been leased to non-Indians pursuant to state statutes. South Carolina then began to negotiate with the Tribe to purchase its land. These efforts culminated in 1840 in the Treaty of Nation Ford in which the Tribe gave up the 144,000 acres granted by the treaties of 1760 and 1763. In exchange South Carolina promised to spend $5,000 to acquire a new reservation, $2,500 cash in hand, and yearly payments of $1,500 for nine years. The United States was not a party to and did not participate in the Treaty of Nation Ford.

In 1842 South Carolina purchased a 630 acre tract for $2,000 as a new reservation for the Tribe. This land continues to be held in trust for the Tribe by South Carolina as an Indian reservation.[3]

In the early 1900s, the Tribe sought to have the federal government assume responsibility for its welfare. These efforts resulted in a 1943 Memorandum of Understanding between the Tribe, the federal government, and South Carolina.[4] In accordance with this agreement, the state purchased 3,434 acres of land and conveyed it in trust for the Tribe to the United States. In addition, the United States agreed to provide economic development

[3] *See* Op. Att'y Gen. S.C., No. 3988 (Mar. 6, 1975).

[4] The federal government refused to include a clause in the 1943 Memorandum that would have specifically extinguished any claims the Tribe might have based on the 1760 and 1763 treaties. In a "formal expression of opinion," the solicitor of the Department of the Interior stated that elimination of the clause was "most desirable in that it avoids a procedure of doubtful legality which would have consisted in using a contract under the Johnson-O'Malley Act in order to deprive the Indian tribe of claims which it might be able to enforce in the courts." Memorandum for the Commissioner of Indian Affairs from the Solicitor of the Department of the Interior, undated, at 3. *See also* Letter of the Assistant Commissioner of Indian Affairs to the State Auditor of South Carolina, dated Aug. 28, 1941.

assistance to the Tribe, and the Tribe agreed to organize to conduct its business on the basis of the federal government's recommendations.

With the advent of the termination era in 1953,[5] the federal government designated the Tribe as a likely candidate for the withdrawal of federal services. Federal assistance during the previous decade had been minimal. In addition, members of the Tribe desired an end to federal restrictions on alienation in order to facilitate financing for farm operations, homes, and improvements on the 3,434 acre reservation.

Efforts at securing the withdrawal of federal services began in earnest in 1958 and resulted in the enactment in 1959 of the Catawba Indian Tribe Division of Assets Act.[6] The Act became effective in 1962, and the 3,434

[5] "Termination era" refers to the federal policy from 1953 to the mid-1960s of ending the federal government's supervisory responsibilities for Indian tribes. *See* F. Cohen, *Handbook of Federal Indian Law* 152-80 (R. Strickland ed. 1982) [cited as Cohen, *Federal Indian Law* (1982)].

[6] 73 Stat. 592, 25 U.S.C. §§ 931-938. The Act provides for the preparation of a tribal membership roll, the tribal council's designation of sites for church, park, playground, and cemetery purposes, and the division of remaining assets among the enrolled members of the tribe.

Sections 935 and 936, with which this litigation is particularly concerned, provide:

> § 935. The constitution of the tribe adopted pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction.

acre reservation, which had been acquired pursuant to the 1943 Memorandum of Understanding, was distributed among tribal members, either as land or as proceeds from its sale.

II

In 1980 the Tribe brought suit against South Carolina and the other defendants. It claims it acquired a vested property right in the 144,000 acre reservation granted the Tribe in the 1760 and 1763 treaties and that upon our nation's independence these lands came within the scope of the federal program for the protection of Indian lands. Consequently, the Tribe asserts the 1840 Treaty of Nation Ford, whereby South Carolina purported to acquire the 144,000 acres, is void because the United States did not participate in or consent to the alienation of the Tribe's reservation as required by the Indian Nonintercourse Act.[7] The Tribe seeks to be restored to possession of its reservation as well as trespass damages for the entire period of its dispossession.

South Carolina argues the 1959 act of Congress bars the Tribe's claim. It contends that § 935 [8] terminates the Tribe, ends any trust relationship between the Tribe and the federal government, and makes state law applicable

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Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States.

§ 936. Nothing in this subchapter shall affect the rights, privileges, or obligations of the tribe and its members under the laws of South Carolina.

[7] 25 U.S.C. § 177 (originally enacted as Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138). The Act states in relevant part: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

Transactions in violation of the Nonintercourse Act are void. Cohen, *Federal Indian Law* 512 (1982).

[8] *See supra* note 6.

to the Tribe's claim. The state also argues that the legislative history supports this interpretation and indicates Congress intended to ratify the 1840 Treaty.

The Tribe counters by arguing that § 935 on its face only terminates federal services to the tribe and makes state law applicable to the individual Indians, not to tribal claims. Furthermore, it argues the text and legislative history indicate Congress only intended to end the federal relationship with the Tribe created by the 1943 Memorandum of Understanding and did not intend to affect any tribal claims arising out of the 1760 and 1763 treaties.

On cross-motions for summary judgment, the district court assumed, without deciding, that prior to 1959 the Tribe was a "tribe" within the meaning of the Nonintercourse Act; that the 1760 and 1763 treaties granted the Tribe some interest in the land in issue; that the land was covered by the Nonintercourse Act; and that prior to 1959 the United States neither approved, ratified, nor consented to the 1840 Treaty of Nation Ford. The court also assumed that a trust relationship existed between the Tribe and the United States at least up to 1959.

The district court granted South Carolina's motion for summary judgment. It held that the 1959 Act extinguished the Tribe's existence; ratified the 1840 treaty; terminated the trust relationship between the Tribe and the federal government; and made state law applicable to the Tribe's claim. It then held that the state statute of limitations barred the claim.

III

In Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-68 (1974), the Supreme Court reiterated the nation's policy with respect to lands occupied by Indians:

> It very early became accepted doctrine in this Court that although fee title to the lands occupied

by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land. . . . The United States also asserted the primacy of federal law in the first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, which provided that "no sale of lands made by any Indians . . . within the United States, shall be valid to any person . . . or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." This has remained the policy of the United States to this day. (footnote omitted)

To establish a *prima facie* case for a violation of the Nonintercourse Act, the Tribe must prove four elements: (1) that it is or represents an Indian tribe within the meaning of the Nonintercourse Act; (2) that the land in issue is covered by the Nonintercourse Act as tribal land; (3) that the United States has never approved or consented to the alienation of the tribal land; and (4) that the trust relationship between the United States and the tribe, established by coverage of the Nonintercourse Act, has never been terminated or abandoned. Epps v. Andrus,

611 F.2d 915, 917 (1st Cir. 1979); Narragansett Tribe of Indians v. Southern R.I. Land Dev. Corp., 418 F. Supp. 798, 803 (D.R.I. 1976).

The district court assumed these elements existed until the enactment of the Catawba Indian Tribe Division of Assets Act of 1959. Thus, the principal issue is whether the 1959 Act precludes the Tribe from relying on the Nonintercourse Act and subjects its claim to the South Carolina statute of limitations.

IV

In considering the effect of the 1959 Act on the Tribe's claim, we must be mindful of the canons of construction the Supreme Court has enunciated for use in construing statutes that affect Indian tribes. Such statutes should not be construed to the Indians' prejudice. Congressional intent to abrogate or modify a treaty right must be clearly expressed, and doubtful expressions are to be resolved in favor of the Indians. *See* Antoine v. Washington, 420 U.S. 194, 199-200 (1975); Mattz v. Arnett, 412 U.S. 481, 504-05 (1973); Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-13 (1963).

Both sides present plausible arguments to support their reading of the 1959 Act in which they rely in part on the Act's legislative history in order to discern Congress's intent. We conclude that it is appropriate to examine the legislative history and surrounding circumstances in order to construe the Act properly. *See* Mattz v. Arnett, 412 U.S. 481, 505 (1973).

The process toward passage began in late 1958 when Bureau of Indian Affairs officers met tribal members. An Indian expressed concern about the Tribe's treaty reservation claim against South Carolina, but the Bureau officer assured him "that any claim the Catawbas had against the State would not be jeopardized by carrying out a program with the Federal Government" for the distribution

of tribal assets.[9] In January 1959, the Tribe adopted a resolution, drafted by the Bureau, which requested the removal of federal restrictions on their 3,434 acre reservation. The resolution specifically conditioned tribal support of division of assets legislation on leaving the treaty reservation claim unaffected:

> Now, therefore, BE IT RESOLVED that, in view of the benefits that will accrue to all of the members of the tribe by the equitable distribution of the tribal assets, its General Counsel . . . hereby formally requests [our Congressman] to introduce and secure passage of appropriate legislation to accomplish the removal of Federal restrictions against the alienation of Catawba land, in York County, South Carolina, so that it can be patented, . . . *and that nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe.* (emphasis added)

The Congressman then requested the Bureau to draft legislation "to accomplish the desires set forth in the Resolution." [10] The Congressman presented the draft bill to the Tribe two months later, again saying it "carr[ied] out the intent of the resolution." [11] The Tribe then approved the bill and it was introduced in Congress on April 7, 1959.

[9] Memorandum of Jan. 30, 1959, from a Program Officer to the Chief of the Branch of Tribal Programs of the Bureau of Indian Affairs, at 7.

For a number of years, South Carolina and the Tribe have unsuccessfully negotiated to settle the Tribe's claim. *See, e.g.*, Letter from the Assistant Commission of the Bureau of Indian Affairs to the Chief of the Catawba Tribe, dated Feb. 3, 1937; Letter from the Assistant Commissioner of the Bureau of Indian Affairs to the State Auditor of South Carolina, dated Feb. 3, 1937. *See generally* U.S. Comm'n on Civil Rights, *Indian Tribes* 117-18 (1981).

[10] Letter from the Congressman to the Legislative Associate Commissioner of the Bureau of Indian Affairs, dated January 26, 1959.

[11] Minutes of Meeting of the Catawba Council held March 28, 1959, at 2.

The House and Senate committee reports on the bill are similar. Both state: "The purpose of [the bill] is to provide for the division of the assets of the Catawba Indian Tribe of South Carolina among its enrolled members in approximately equal shares." [12] In addition, the reports quote from a Department of the Interior recommendation which states:

> In accordance with the [1943] memorandum of understanding, the State bought 3,434.3 acres of land for the Catawbas and . . . conveyed the land to the United States in trust for the tribe. It is this land and the accumulated assets from operating it that will be conveyed under the provisions of the bill.[13]

The bill was signed by President Eisenhower on September 21, 1959, and became effective in 1962. At that time, the Department of the Interior informed the Tribe of the revocation of its constitution, the transfer of jurisdiction to the state, and the termination of the 1943 Memorandum of Understanding.[14]

Viewed in its entirety, we believe the legislative history of the 1959 Act fails to suggest any congressional intent to affect any claim the Tribe might have against South Carolina. Rather, the legislative history and text of the Act indicate it was intended only to end federal supervision and assistance arising out of the 1943 Memoran-

[12] S. Rep. No. 863, 86th Cong., 1st Sess. 1 (1959); H.R. Rep. No. 910, 86th Cong., 1st Sess. 1 (1959), *reprinted in* 1959 U.S. Code Cong. & Ad. News 2671, 2672.

[13] S. Rep. No. 863, 86th Cong., 1st Sess. 3 (1959); H.R. Rep. No. 910, 86th Cong., 1st Sess. 3 (1959), *reprinted in* 1959 U.S. Code Cong. & Ad. News 2671, 2673.

[14] *See* Letter from the Secretary of the Department of the Interior to the Chief of the Catawba Tribe, dated June 15, 1962.

dum of Understanding. Although the House and Senate reports show Congress was aware of the 1840 Treaty, there is no explicit or implicit indication of any desire to extinguish any tribal claims against South Carolina. In fact, the Act's history suggests a congressional intent not to affect any such claims. The Tribe conditioned introduction of the Act on leaving the treaty reservation claim unaffected, and the Act's congressional sponsor stated it was designed to accomplish the Tribe's desires as expressed in the tribal resolution.

We therefore cannot accept the district court's interpretation of the 1959 Act as ratifying the 1840 Treaty. The Act does not expressly ratify it. There also is no mention of the 1760 and 1763 Treaties, by which the Tribe received the 144,000 acres in issue. Thus, the district court's construction of the Act is contrary to the requirement that congressional intent to terminate a treaty reservation must be clear. *See* DeCoteau v. District County Court, 420 U.S. 425, 444 (1975).

V

Essential elements of a cause of action under the Nonintercourse Act are proof that the complainant is an Indian tribe and that it has maintained a trust relationship with the federal government. The district court assumed that the Catawbas satisfied these requirements before 1959, but it concluded that the Division of Assets Act terminated the Tribe's existence. The court also held that the Act terminated the Tribe's trust relationship with the federal government with respect to the Nonintercourse Act. In support of the district court's decision, South Carolina emphasizes that the 1959 Act revoked the Tribe's constitution.

The authoritative commentary, Cohen, *Federal Indian Law* 815 (1982), explains the effect of termination on tribal status:

> Termination legislation did not literally terminate the existence of the affected tribes. Further, its effect was not necessarily to terminate all of the federal government's relationship with those tribes. Tribal powers can be extinguished only by clear and specific congressional action. Indian tribes can be recognized by the United States for some purposes and not for others. (footnotes omitted)

Cohen's explanation is fully supported by cases that have considered this issue. *See, e.g.*, Menominee Tribe of Indians v. United States, 388 F.2d 998, 1000-01 (Ct. Cl. 1967), *aff'd*, 391 U.S. 404 (1968) (by implication); Kimball v. Callahan, 590 F.2d 768, 773-75 (9th Cir. 1979).

Revocation of the Tribe's constitution did not terminate the Tribe. The tribal constitution was adopted pursuant to 25 U.S.C. § 476 [15] and the 1943 Memorandum of Understanding. Its revocation is consistent with the termination of federal assistance arising out of that Memorandum. As we mentioned in note 4, *supra*, the federal government on advice of the Solicitor of the Department of Interior refused to include a clause in the 1943 Memorandum of Understanding that would have extinguished any claims the Tribe might have based on the 1760 and 1763 treaties. The constitution was adopted to implement the Memorandum of Understanding. Consequently, it would be illogical, and indeed ironic, to hold, as South Carolina urges, that Congress intended revocation of the constitution to defeat the same treaty claims that the

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[15] "Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws . . . ."

This provision was enacted in order to encourage revitalization of tribal self-government through the adoption of more formal governmental procedures. *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151-52 (1973).

parties to the Memorandum of Understanding had refused to extinguish.

The Supreme Court has defined a "tribe" as a "body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory . . . ." Montoya v. United States, 180 U.S. 261, 266 (1901). The Court has applied this definition to bring within the scope of the Nonintercourse Act a tribe of Indians that did not have a federally recognized form of government. *See* United States v. Candelaria, 271 U.S. 432, 441-42 (1926). *See also* Cohen, *Federal Indian Law* 18 (1982) ("any continuing organization, however informal, would deny the abandonment of tribal existence"). Despite revocation of the tribal constitution, the Catawba Tribe continued as a body of Indians, united in a community under one leadership, and inhabiting a particular territory. Ind d, South Carolina to this date recognizes the Tribe's existence by continuing to hold a 630 acre reservation in trust for it.[16]

Any doubt about the effect of the 1959 Act on the Tribe's existence is put to rest by reference to its text. The Act provides for a final roll of the membership of the Tribe for the disposition of its assets. It authorizes the tribal council to designate any part of the Tribe's land that is to be set aside for church, park, playground, or cemetery purposes. 25 U.S.C. §§ 931 and 933. Furthermore, it provides that nothing in the Act shall affect the rights, privileges, and obligations of the Tribe under the laws of South Carolina. 25 U.S.C. § 936. Clearly, the Congress did not intend the Division of Assets Act of 1959 to end the Tribe's existence.

We also hold that the 1959 Act did not end the trust relationship between the Tribe and the federal govern-

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[16] *See supra* note 3 and accompanying text.

ment. The *res* of this trust is the Tribe's reservation, which was created by the Treaty of Pine Tree Hill in 1760 and the Treaty of Augusta in 1763 with the English Crown. When the Nonintercourse Act was enacted some 27 years later, these treaties were in effect. The Tribe's right of occupancy, conferred by the treaties, was honored by the United States which had succeeded to the rights claimed by the English Crown, and the Tribe's right of occupancy could be abrogated only by the federal government. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-70 (1974); United States v. Santa Fe Pacific R.R., 314 U.S. 339, 345-47 (1941); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 586 (1823).

The purpose of the Nonintercourse Act was to assert the primacy of federal law and to acknowledge and guarantee the Tribe's right of occupancy to their lands. *See Oneida Indian Nation*, 414 U.S. at 667; *Santa Fe Pacific R.R.*, 314 U.S. at 348. The Nonintercourse Act creates a trust or fiduciary relationship between the federal government and the tribe somewhat akin to the relationship of guardian and ward. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975). *Passamaquoddy* establishes that a trust relationship created by the Nonintercourse Act exists even though federal officials charged with supervision of Indian Affairs disclaim any responsibility for the Tribe. *Passamaquoddy* also establishes that the absence of federally recognized tribal government and the exercise of state jurisdiction over a tribe and its members neither dissolves the trust relationship arising out of the Nonintercourse Act nor renders the Act inapplicable to the tribe's claims.

Congress, of course, may terminate the trust relationship, thus abrogating the federally recognized right of the tribe to its occupancy of reservation lands, but its

intention to do so must be plain and unambiguous to be effective. *See* DeCoteau v. United States, 420 U.S. 425, 444 (1975); *Santa Fe Pacific R.R.*, 314 U.S. at 346; *Passamaquoddy*, 528 F.2d at 380. Doubtful expressions of legislative intent must be resolved in favor of the Indians. *DeCoteau*, 420 U.S. at 444.

In support of its contention that the Division of Assets Act of 1959 terminated both the existence of the Tribe and its trust relationship with the federal government, South Carolina particularly relies on the clause in 25 U.S.C. § 935 which provides:

> [T]he Tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction.

South Carolina argues that this provision included the withdrawal of the protection conferred on the Tribe by the Nonintercourse Act. The Catawbas insist that this provision of the 1959 Act applies only to individual Indians and not to the Catawba Tribe. The applicability of the Nonintercourse Act to the rights of the Tribe, they assert, was not affected.

The legislative histories of both the Nonintercourse Act and the 1959 Act, and Supreme Court precedent, support the position of the Catawbas. Although the terms "Indians" and "Indian tribes" frequently have been used interchangeably in various contexts, the distinction is critical when the application of the Nonintercourse Act is an issue. Initially the Act applied to both Indians and Indian tribes. Later, however, Congress deleted the reference to Indians. *See* 4 Stat. 730-31 (1834). Henceforth, the Nonintercourse Act afforded protection only to the

lands of Indian tribes. We do not feel free to assume that Congress was unaware of this distinction. We cannot attribute to Congress an intention to bar by the 1959 Act the Catawba's claim to tribal lands. By providing that "all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them," we conclude that Congress did not intend to render inapplicable the Nonintercourse Act which by its terms applied to Indian tribes. As we have pointed out, the Catawbas had been assured by a representative of the Bureau of Indian Affairs and the congressional sponsor of the 1959 Act that their resolve to preserve their claims against South Carolina would not be affected by the Act. We will not impute to Congress an intent to circumvent these assurances by implicitly enlarging the term "Indians" to embrace the "Catawba Indian Tribe."

Precedent supporting the Catawbas is found in Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968). In that case the question arose whether the Menominee Termination Act of 1954 abrogated the Tribe's fishing and hunting rights conferred by a treaty in 1854. The Court held that the Act did not have this effect, saying at 412-413:

> The Termination Act by its terms provided for the "orderly termination of Federal *supervision* over the property and members" of the tribe. 25 U.S.C. § 891. (Emphasis added.) The Federal Government ceded to the State of Wisconsin its power of supervision over the tribe and the reservation lands, as evident from the provision of the Termination Act that the laws of Wisconsin "shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within [its] jurisdiction."
>
> The provision of the Termination Act (25 U.S.C. § 899) that "all statutes of the United States which

affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe" plainly refers to the termination of federal supervision. The use of the word "statutes" is potent evidence that no *treaty* was in mind.

We decline to construe the Termination Act as a back-handed way of abrogating the hunting and fishing rights of these Indians. While the power to abrogate those rights exists . . . "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress."

There is no explicit or clear implicit indication in the 1959 Act that Congress intended to terminate the relationship arising out of the Nonintercourse Act's application to the lands granted by the 1760 and 1763 Treaties. Furthermore, in at least one similar act, Congress clearly terminated the federal trust relationship with respect to the affected tribe, something it did not do in the 1959 Act. *Compare* 25 U.S.C. § 935 (Catawba Tribe, no explicit termination) *with* 25 U.S.C. § 980 (Ponca Tribe, explicit termination).

VI

Having concluded that the 1959 Act made the South Carolina statute of limitations applicable to the Tribe's claim, the district court went on to hold that the state statute barred the claim.

Section 936 explicity provides that nothing in the Act shall affect the rights of the Tribe under the laws of South Carolina.[17] For the purpose of the summary judgment entered by the district court, it was assumed that prior to the enactment of the Division of Assets Act in 1959 the South Carolina statute of limitations did not affect the right of the Tribe to claim its tribal reservation. Consequently, it is incongruous to say, despite § 936, that the 1959 Act did affect this right by allowing application of the state statute of limitations to bar the claim. Yet this is precisely what the district court did through its interpretation of the 1959 Act.[18] The 1959 Act neither prohibits nor authorizes the application of state law to bar the Tribe's reservation claim.

We cannot accept the district court's interpretation of the 1959 Act. Consequently, its decision that the state statute of limitations bars the Tribe's claim must be set aside. The Nonintercourse Act and the supremacy clause preempt state law defenses, such as adverse possession or statutes of limitation, which might otherwise preclude the Tribe's suit. *See* Mohegan Tribe v. Connecticut, 638 F.2d 612, 614-15 (2d Cir. 1981); United States v. 7,405.3 Acres of Land, 97 F.2d 417, 422 (4th Cir. 1938).

VII

We conclude that the Catawba Indian Tribe Division of Assets Act of 1959 did not ratify the 1840 Treaty, extinguish the Tribe's existence, terminate the trust relationship of the Tribe with the federal government arising out of the Nonintercourse Act, or make the state statute of limitations applicable to the Tribe's claim. In short, the 1959 Act is neutral with respect to the Tribe's reservation claim. It neither confirms the claim nor extinguishes it.

The judgment of the district court is reversed, and the case is remanded for entry of an order denying the defendants' motion for summary judgment and for further proceedings consistent with this opinion.

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[17] *See supra* note 6.

[18] The district court held:

> Because [§ 935] of the Catawba Act explicitly made state law applicable to the Catawbas and the termination of the trust relationship accomplished the same result, South Carolina's statute of limitations began to run against any claim the Catawbas or the plaintiff may have had on July 1, 1962, the date the Catawbas' constitution was revoked.

EXHIBIT C

The Dissent To The Panel Majority Opinion

HALL, Circuit Judge, dissenting:

I cannot accept the majority's conclusion that the district court erred in granting defendants' motion for summary judgment and in dismissing plaintiff's action. In my view, the 1959 Catawba Indian Tribe Division of Assets Act, 25 U.S.C. § 931 *et seq.*, unquestionably terminated the Tribe's legal existence, ended any trust relationship between the Catawbas and the federal government, and made South Carolina law fully applicable to whatever claim plaintiff may have had to the Tribe's ancestral land. I agree with the district court that plaintiff's claim, if valid at all, is in any event barred by South Carolina's statute of limitations governing real property. I must, therefore, dissent.

Plaintiff in this case, a non-profit corporation, alleges that it is the successor to the Catawba Indian Tribe and that, as such, it has an ownership interest in approximately 144,000 acres of land in three South Carolina counties. According to the record, however, by 1840, the Catawbas had leased to white settlers all of the 144,000 acres now in dispute.[1] In 1840, the Catawbas entered into an agreement with the State of South Carolina, known as the Treaty of Nation Ford, in which they gave up any remaining interest they had in the 144,000 acres. Now, by seeking to defeat this 1840 transaction, plaintiff requests relief which would destroy the titles of more than 27,000 South Carolina citizens. In light of this history and because of the provisions of the Catawba Act,

[1] The 1763 Treaty of Augusta, entered into between the Tribe and the representatives of the King of England, in which the Catawbas agreed to be settled on the 144,000-acre tract, contained no restrictions on alienating this property.

it is clear to me that plaintiff's claim to the Tribe's ancestral land must fail.

Unlike the majority, I am convinced that the central purpose of the Catawba Act was to terminate federal responsibility to the Tribe and its individual members. Partial termination was specifically rejected by the bill's sponsor and the Catawbas, who voted in favor of complete termination. Furthermore, the plain and far-reaching language of the Act clearly reflects congressional intent to terminate any special federal status the Catawbas may previously have held and to put them on an equal footing with other citizens. To this effect, the Act even includes a provision which revokes the tribe's constitution. Under Section Five of the Catawba Act, 25 U.S.C. § 935:

> The constitution of the tribe adopted pursuant to . . . this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and *the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction.* Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States. (Emphasis added).

Section 6 of the Catawba Act, 25 U.S.C. § 936, similarly provides that "[n]othing in this subchapter shall affect the rights, privileges, or obligations of the tribe and its members *under the laws of South Carolina.*" (Emphasis added).

In my view, the revocation of the Tribe's constitution unequivocally ended the Catawbas' existence as a political or governmental entity under federal law and prevents

plaintiff from having the necessary standing to bring this action under the Nonintercourse Act. As the majority opinion correctly notes, there are four prerequisites to establishing a prima facie case under the Nonintercourse Act. *Epps v. Andrus*, 611 F.2d 915, 917 (1st Cir. 1979). One of these requirements is that plaintiff show that it is or represents an Indian tribe. In my view, the revocation of the Tribe's constitution makes it impossible for plaintiff to establish this necessary element of a prima facie case. Furthermore, the revocation of the Catawbas' tribal constitution terminated the trust relationship between the Tribe and the United States, rendering it impossible for plaintiff to meet yet another prerequisite to a prima facie case under the Nonintercourse Act. Because plaintiff can establish neither of these requirements, its claim under the Nonintercourse Act is fatally defective.

Moreover, the explicit statutory language of Sections 5 and 6 of the Catawba Act makes it clear that the legislation was intended to accord the Catawbas the same privileges and responsibilities as other South Carolina citizens. Thus, from the time the tribe's constitution was revoked on July 1, 1962, the Catawbas, and any federal claim they might have then had, were subject to the operation of state law in the same manner as all other citizens of South Carolina and their claims.

One of the laws that became applicable to the Catawbas in 1962 was South Carolina's statute of limitations governing real property claims. S.C. Code § 15-3-340 states in pertinent part that "[n]o action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action." Thus, even if the Catawba Act did not extinguish the Catawbas' claim to the land which their ancestors had long since alienated,

this suit, brought some 18 years after the statute of limitations had begun to run, is unquestionably time-barred.

The application of South Carolina's statute of limitations in this case is entirely consistent with Supreme Court precedent. In *Affilated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), the Supreme Court's most recent decision construing a termination act, terminated Indians were required to challenge allegedly fraudulent transfers of property under the same laws as non-Indians. In an earlier decision, *Schrimpscher v. Stockton*, 183 U.S. 290 (1901), Indian heirs sued to recover land conveyed by a Wyandotte Indian at a time when alienation was prohibited by federal treaty. In light of a subsequent treaty, which had terminated such restrictions, the Supreme Court held that the state statute of limitations had run, precluding recovery:

> Their disability terminated with the ratification of the treaty of 1868. The heirs might then have executed a valid deed of the land, and possessing, as they did, an unincumbered [sic] title in fee simple, they were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands; in other words, *they were bound to assert their claims within the period limited by law.* This they did not do under any view of the statute, (whether the limitation be three or fifteen years,) since it began to run at the date of the treaty, 1868, and the action was not brought until 1894, a period of over twenty years. *Id.* at 296. (Emphasis added).

See also, Dillon v. Antler Land Co., 341 F.Supp. 734 (D. Mont. 1972), *aff'd* 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975); *Dennison v. Topeka Chambers Industrial Development Corp.*, 527 F.Supp. 611 (D. Kan. 1981) (both holding that state statutes of

limitations began to run once restrictions are removed and state law is made applicable).[2]

As the Tenth Circuit noted in *Reyos v. United States*, 431 F.2d 1337, 1343 (10th Cir. 1970), *aff'd in part and rev'd in part, Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), "[i]t is not for administrative officials or for the courts to modify this statutory termination by the creation of some status lying between wardship and complete termination." I submit that the majority in this case has impermissibly substituted its own judgment for that of Congress. By doing so, it has succeeded in nullifying the clear mandate of the Catawba Act and has placed in jeopardy the long-established rights of over 27,000 South Carolina citizens. Because I believe the district court was correct in dismissing plaintiff's action, I would affirm the judgment below.

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[2] The majority's reliance on the Supreme Court's decision in Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968), is misplaced. In *Menominee*, the tribal constitution was not revoked, as in the present case. Furthermore, the hunting and fishing rights, which were the subject of the Menominees' claim, had never been alienated. In this case, the Catawbas have not occupied the property in question for more than 180 years.

EXHIBIT D

The Concurring Opinion To The En Banc Decision

MURNAGHAN, Circuit Judge, concurring:

For the reasons so cogently expressed by Judge Butzner in his opinion for the panel majority, I agree that "the Catawba Indian Tribe Division of Assets Act of 1959 did not ratify the 1840 Treaty, extinguish the Tribe's existence, terminate the trust relationship of the Tribe with the federal government arising out of the Nonintercourse Act, or make the state statute of limitations applicable to the Tribe's claim." *Catawba Indian Tribe of South Carolina v. State of South Carolina*, 718 F.2d 1291, 1300 (4th Cir. 1983).[1] While the dissent has delivered a respectable argument to the contrary, we face at most a case in which the congressional statment is open to dual interpretations. We may, however, permit only a plain and unambiguous expression of congressional intent to abrogate a federally recognized right and terminate a trust relationship. Furthermore, construction of statutes affecting Indian tribes should proceed on the basis of tender concern for the rights of Indians. The uncertainty in statutory interpretation in the instant case is properly resolved in favor of the Catawba Tribe.

I therefore unreservedly join in the opinion of Judge Butzner, reversing the award of summary judgment in favor of South Carolina. As for the other defendants, landowners of parcels compositely comprising the 144,000 acres, no arguments separate and distinct from those ad-

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[1] Judge Butzner's panel majority opinion is adopted by reference in the *per curiam* opinion following *en banc* rehearing. Judge Butzner was joined by Chief Judge Winter, Judge Sprouse, and now by me. The opposing opinion of Judge Hall was joined by Judge Widener and Judge Phillips. It, too, is incorporated by reference in the *per curiam* opinion.

vanced on behalf of the State of South Carolina have been made, and consequently, on the present state of the record I also agree that summary judgments in their favor should be reversed.

My concurrence with respect to the private defendants, however, is a troubled one. Since the Tribe's claim at present includes the right to actual possession, a complete victory for the Catawba Tribe would leave up in the air or by the side of the road the approximately 27,000 people claiming title through deeds or other sources to the 144,000 acres. It appears to be a tacit assumption that ejection would never be allowed actually to occur, even were we in the end to validate continued vitality of the Indian title to the 144,000 acres. Rather, through accommodation between the Indians and either or both of the United States and the State of South Carolina, the Catawba Tribe would relinquish all possessory claims in return for money or other benefits.

For myself, I take little solace in the consideration that a proper, fair and equitable result *may* possibly come about by reason of enlightened, but by no means mandatory, legislative or executive action. Such a posture would still leave too many innocent good faith landowners at an awesome risk that political realities related to efforts by both sovereigns to right a long standing wrong, might lead to the Queen of Spades ultimately winding up in the hands of the individual owners.

While I therefore harbor grave doubts, that, as a matter of grace, a government will rescue the current occupants of the land, I take greater comfort in the realization that there may be available on remand an argument that would at once retain the vitality of the claims of the Catawba Tribe and also afford protection to the innocent, private landowners.

> [A]s the Supreme Court held in *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 47 S.Ct. 142, 71 L.Ed. 294 (1926), if the ejectment of current occupants and the repossession by the Indians of a wrongfully taken land is deemed an "impossible" remedy, *id.* at 357, 47 S.Ct. at 143, the court has authority to award monetary relief for the wrongful deprivation. *Id.* at 359, 47 S.Ct. at 144.

Oneida Indian Nation of New York v. State of New York, 691 F.2d 1070, 1083 (2nd Cir. 1982). In reaching its result, the *Yankton* court expressed its concerns for the plight of the innocent landowners:

> It is impossible, however, to rescind the cession and restore the Indians to their former rights because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers . . . .

Yankton Sioux Tribe v. United States, supra, at 357. The court concluded that, since the Indians were entitled to a judgment in their favor, but a restoration of the lands to the Indians was an impossible remedy, the Indians were "entitled to just compensation as for a taking under the power of eminent domain." *Id.* at 359.[2]

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[2] It is not particularly earthshaking for a court to tailor the remedy to the problem at hand. Monetary relief representing fair value is "just compensation" and constitutionally is the equivalent of tangible or real property. *See, e.g., United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979); *Olson v. United States*, 292 U.S. 246, 255 (1934); *United States v. 131.68 Acres of Land*, 695 F.2d 872 (5th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S. Ct. 77 (1983) ("[T]he government must, and need do no more than, put the owner in '. . . as good a position pecuniarily as if his property had not been taken.'" *Id.* at 875, *quoting Olson v. United States, supra*, at 255). The public purpose to justify a taking is not open to serious question. At a bare minimum, present occupants should not be required, because customarily in unitary instances of ejectment the remedy is return of the property itself and not a monetary "substitute," to surrender possession, if just compensation is indeed awarded to the Catawba Tribe.

Under *Yankton* and *Oneida*, therefore, one or both of the sovereigns (the United States or South Carolina) may indeed owe to the Tribe just compensation. On that basis, the titles of the 27,000 landowners would be held to be paramount and they, without surrender of the land or payment in cash, would be entitled to judgment. South Carolina's liability might arise from the fact that, assuming that the 1840 Treaty is invalid under the Non-intercourse Act, the state entered into an invalid treaty with the Catawba Tribe and induced innocent landowners to settle on the land. That may be held to translate into an obligation to protect the present occupants or other claimants by paying just compensation to the Catawbas for the land.

As for the United States,[3] it remains to be explored whether liability to pay just compensation to the Indians

[3] Nothing should preclude amendment by the Catawba Tribe of its complaint to name the United States as a defendant, thereby presenting the issue for resolution. Similarly, South Carolina might endeavor to raise the question through impleading the federal government.

It would remain to be seen whether either the Catawba Tribe or South Carolina could overcome a likely claim of sovereign immunity raised by the United States. *See, e.g., Affiliated Ute Citizens v. United States*, 406 U.S. 128, 141-143 (1972). *Cf. Antonie v. United States*, 637 F.2d 1177, 1181-82 (11th Cir. 1981); *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143, 146-147 (8th Cir. 1970). *See also United States v. Oneida Nation of New York*, 477 F.2d 939 (Ct. Cl. 1973). It might become necessary to explore the possibility that consent in this instance can be inferred from the Nonintercourse Act, the 1959 Act or even some future legislation Congress may see fit to enact.

An analogous obstacle to recovery from South Carolina may arise in the Eleventh Amendment context. *See, e.g., Edelman v. Jordan*, 415 U.S. 651 (1974). *But cf., Parden v. Terminal Railway*, 377 U.S. 184 (1964); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). *See generally*, L. Tribe, *American Constitutional Law*, 129-138 (1978).

Alternatively, the time may be at hand to decide whether, in the dying writhings of an outmoded concept, time has passed sovereign

arises, either from the Government's failure to protect their claim to possession despite the special relationship between the United States and the Indians, or from the government's failure to extinguish the Catawba's possessory claims in light of the extensive reliance by the innocent parties on apparently good and clear title.[4]

The resolution of the competing claims through the just compensation concept has the great and equitable advantage of protecting the innocent landowners from sustaining monetary injury. Certainly, the two sovereigns, the United States and the State of South Carolina,

immunity by if not elsewhere in the absence of legislative consent to be sued, at least in the area of executive and legislative actions relating to relationships at the highest governmental levels such as those between the United States and an Indian tribe.

Even if sovereign immunity concepts still would preclude in this case recovery against the United States and South Carolina, they concern only a jurisdictional barrier, and do not preclude judicial allocation of rights and responsibilities. If the United States and South Carolina elect to plead sovereign immunity, and therefore to waive the right to appear and assert their positions when a court is determining who owes what to whom, a right of the Catawba Tribe against the sovereigns may no less be asserted and established even if judicially it may not be enforced. The right, outstanding if not realizable by judicial process, may nevertheless be pursued in the halls of the legislatures. It should not lightly be inferred that a government, the best we know and have, will not respond to a valid claim or claims simply because it cannot be compelled to pay.

The question here remains as to where rights and responsibilities to the land or to compensation for it lie. Legally, the question of who is entitled is not the same as who may enforce in court the entitlement. It remains for a later stage in these proceedings to address potentially far-reaching and tantalizingly fascinating questions.

[4] It may also become necessary to consider whether cases such as *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 284-5 (1955) are distinguishable on the basis that, in those cases, explicit and affirmative action by the Congress, rather than neglect or a failure to act, led to the abrogation of the Indians' possessory claims.

have done nothing to warn them off the land. To the contrary, the sovereigns have actively encouraged their settlement or the settlement of their predecessors, and, no doubt, have actively benefited through real property and income taxes assessed against the land in their hands or against profits generated by its use.

Resolution of the issues raised above is, of course, premature. After remand, it remains possible that one, or both, sovereigns can be stimulated into doing what together they should have done long since. Additionally, the parties may be able to resolve their differences by means wholly apart from those suggested here. The route described is merely one attempt to avoid remedying one inequity by perpetrating another, perhaps greater, one. It would indeed be tragic and unfair for the long-overdue resolution of the Catawba Tribe's claims to occur exclusively and disproportionately at the expense of the more than 27,000 innocent South Carolina citizens with claims to the contested land, more recent in the sense of strict accuracy than those of the Tribe, but long standing in fact, reaching back over 140 years. By our society's general attitude, a title of that uninterrupted duration should be good against the world.

EXHIBIT E

The District Court Opinion

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 80-2050

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, also known as the CATAWBA NATION OF SOUTH CAROLINA,
Plaintiff

v.

STATE OF SOUTH CAROLINA, *et al.*,
Defendants

[Filed June 14, 1982]

MEMORANDUM AND ORDER GRANTING
SUMMARY JUDGMENT

INTRODUCTORY REVIEW

The complaint in this civil action was filed October 28, 1980. This suit was brought by the Catawba Indian Tribe of South Carolina for possession of approximately one hundred forty thousand (140,000) acres of land in York, Lancaster and Chester Counties, South Carolina, which plaintiff maintains were illegally taken from it by the Treaty of Nation Ford with the State of South Carolina in 1840. It also seeks historic trespass damages for the period of its dispossession.

Plaintiff claims that the subject lands were reserved as an Indian reservation in treaties with the King of England in 1760 and 1763. Upon the adoption of the Constitution and the Indian Nonintercourse Act of 1790, Indian affairs came under the exclusive province of the Federal Government. Thus, plaintiff asserts that because the United States did not participate in or subsequently ratify the 1840 Treaty with South Carolina, the transaction is void, conveyed no legal title and the subject lands remain an Indian reservation to this day. Plaintiff bases its claim upon the treaties with the Crown, the United States Constitution, and the Nonintercourse Act, which is presently codified at 25 U.S.C. § 177.

It is noticed in the complaint that the Catawba Tribe of South Carolina is duly organized under the laws of the State of South Carolina as a nonprofit corporation. Plaintiff Catawba Indian Tribe, Inc., is the successor to the Catawba Indian Tribe which was a signatory to the Treaty of Pine Tree Hill in 1760 and the Treaty of Augusta in 1763.

In this lawsuit, plaintiff has joined approximately ninety defendants, which include the State of South Carolina, other public entities, corporations and individuals. Those defendants are sued both individually and as representatives of all other persons who assert an interest in any portion of the subject lands. Plaintiff filed a motion for class certification asserting that the class will total at least 27,000 persons.

Upon the filing of this case all the District Judges for the District of South Carolina recused themselves. Thereafter this civil action was assigned to the undersigned by special designation. In the meantime, Chief Judge Charles E. Simons, Jr., entered an Order upon the motion of counsel for plaintiff extending the time to answer or otherwise plead to the complaint for 20 days following an Order disposing of plaintiff's motion to certify the

defendant class. In the meantime many appearances by counsel were entered on behalf of the various defendants. Thereafter a status conference was held before the undersigned on February 18, 1981. Pursuant to the understanding reached with counsel, a schedule with respect to filing 12(b) motions and replies thereto was indicated in my Order of April 15, 1981, which in turn stayed consideration of motions for class certification and the filing of any motions by plaintiff pursuant to Rule 56. Thereafter on June 19, 1981, defendants filed a motion to dismiss accompanied by a brief in support of its motion as well as an appendix to the memorandum in support of the motion to dismiss. Plaintiff filed a response to defendants' motion to dismiss on August 20, 1981, together with appendix exhibits in response to defendants' motion to dismiss.

A full hearing on defendants' dismissal motion was held at Rock Hill on October 28, 1981. It is to be observed in this case that able and experienced counsel represent these parties. The oral argument and written documents and especially briefs exhibit the high professional learning and aptitude on the part of the lawyers in this case. They have been amiable and considerate among themselves and with the Court.

It is to be observed that at the October hearing a wide range of oral argument and discussion took place in open court. It developed that although the dismissal motion was filed under Rule 12(b)(6), that is, (on the ground that the complaint failed to state a claim upon which relief can be granted), matters outside the pleadings were discussed and considered, that is, the appendices accompanying the briefs of each counsel which were not excluded by the Court. Thus the motion was to be treated as a motion for summary judgment and disposed of as provided in Rule 56.

Counsel for South Carolina and for the other defendants from the inception of this lawsuit have contended

that the statute enacted by Congress in 1959 referred to as both the Catawba Termination Act and the Catawba Tribe of South Carolina Division of Assets Act, 25 U.S.C. 931 et seq., must be given effect by this Court, and when the statute is applied this case must be dismissed.

Apparently because of the wide ranging discussion and oral argument at the October 28th hearing, defendants' counsel on November 25, 1981, filed a motion for entry of a supplemental order together with a brief in support thereof, as well as the proposed supplemental order. On December 7, 1981, plaintiff's counsel filed a motion in response to defendants' motion for the supplemental order in which it was indicated that plaintiff had no objection to the supplemental order as suggested by defendants. Whereupon the following order was entered by this Court on January 15, 1981:

"SUPPLEMENTAL ORDER

"*1.* On or before February 26, 1982, the plaintiff and the moving defendants each shall submit proposed orders for the resolution of the motion for summary judgment. The proposed orders shall address only the issues previously briefed and argued by the parties before this Court concerning the consequences of the 1959 legislation referred to by the defendants as the Catawba Termination Act.

"*2.* The Court understands that accompanying defendants' brief in support of its Motion To Dismiss it filed appendices with Exhibits 1 through 39 inclusive, and opposing defendants' motion plaintiff filed Exhibits 1 through 61 inclusive with its brief. The Court further understands that counsel stipulated at the hearing October 28, 1981, at Rock Hill, that these two appendices are now in evidence and are a historical record and are the basis for the Court's ruling that the motion in this case is to be decided under Rule 56 rather than under Rule 12(b)(6).

"*3.* Within 20 days after the proposed orders are exchanged between counsel, if desired, supplemental briefs may be filed. Thereafter, oral argument may be directed."

Thereafter on February 26, 1982, defendants' counsel filed a proposed order styled: *Proposed Order Granting Summary Judgment.* On the same date, counsel for plaintiff filed a proposed order in opposition to defendants proposed order. Plaintiff's proposal is extensive. It has some 52 factual statements and some 60 conclusions of law. It seeks a denial of defendants' motion for summary judgment.

This Court is of the firm view that a decision must be made as to whether the Catawba Termination Act is to be given the effect as contended by defendants or given the limited effect as contended by plaintiff, that is, that only the Memorandum of Understanding entered into in 1943 between the Federal Government, the State of South Carolina, and the Catawba Indian Tribe was terminated by the statute.

Upon due consideration of the two proposed orders presented together with the historical record and the authoritative decisions cited by counsel, as well as the respective arguments, this Court has concluded that there is no genuine issue as to any material fact and that defendants' motion for summary judgment must be granted and this case dismissed.

Congress having acted, it is believed that this Court should give full effect to the statute since from the inception of this Government Congress has regulated the affairs of Indians in all their aspects.

Defendants' proposed order granting summary judgment submitted by counsel for defendants is herewith adopted and made an integral part of this decision.

Plaintiff's proposed order for a judgment in opposition thereto is rejected.

Defendants' order follows:

I. *INTRODUCTION TO DEFENDANTS' ORDER*

A. *The Claim*

This action seeks to void the titles presently held by more than 27,000 persons and public or private entities to land in a 225 square mile area surrounding and including Rock Hill, South Carolina. The plaintiff, Catawba Indian Tribe of South Carolina, Inc., is a corporation operated by persons claiming to be the descendants of Catawba Indians. The plaintiff alleges that the Catawba Indians owned and occupied the land in issue "from time immemorial", and that their ownership was confirmed by agreements and treaties with British and colonial officials in 1760 and 1763. In 1840, the Catawba Indians entered into the Treaty of Nation Ford with the State of South Carolina and thereby transferred any interest they might have had in that land to the State of South Carolina. That treaty and all titles deriving from it are alleged to be void because the transfers effected by that Treaty allegedly violated those provisions of the various Indian Trade and Intercourse Acts regulating the alienation of Indian land, known as the Non-intercourse Act and presently codified as 25 U.S.C. § 177.

B. *The Motion*

The defendants' motion asserts that a 1959 act of Congress (codified at 25 U.S.C. §§ 931-938 and referred to here as the "Catawba Act") bars the prosecution of this action as a matter of law. The defendants' motion has been treated as a motion for summary judgment because, pursuant to the stipulation of the parties, the exhibits to their memoranda have been considered as historical background concerning the Catawba Act.

The only fact necessary to resolve this motion is the undisputed fact that, in 1959, Congress passed the Catawba Act. Because the defendants' motion is addressed solely to the effect of that act upon the legal status of the Catawbas and their claims, the plaintiff's allegations concerning its status prior to 1959 have been assumed, but not found, to be true. Similarly, the plaintiff's allegations concerning events occurring before the 1950's have been assumed, but not found, to be true.

II. *UNDISPUTED FACTS AND ALLEGATIONS ASSUMED TO BE TRUE*

A. *The Parties*

1. The plaintiff is the Catawba Indian Tribe of South Carolina, Inc. ("plaintiff"), a non-profit organization incorporated under the law of South Carolina. [Complaint ¶ 5] The plaintiff's assertions that the persons whom it represents, or their ancestors, were at all relevant times prior to 1959 an Indian tribe, and that plaintiff corporation has succeeded to any rights the alleged tribe may have had, are *assumed* to be true for the purpose of this motion only. The Court judicially notices, however, that the United States appears never to have formally recognized the Catawbas, and notes that the factual question of whether the Catawbas were a tribe is, in any context other than the present motion, disputed.

2. The defendants include the State of South Carolina, other public entities, corporations and individuals. Those defendants are alleged to be representative of a class of at least 27,000 people. [Affidavit of Robert M. Jones, filed October 29, 1980 in support of Plaintiff's Motion for Class Certification]

B. *The Land In Issue*

3. The land sought by the plaintiff but currently held by the defendants and the putative class consists of ap-

proximately 144,000 acres or 225 square miles which includes the City of Rock Hill, the Town of Fort Mill and several other smaller communities. Presently located on the land in issue are homes, places of business, schools, churches and government buildings. The land lies in York, Lancaster, and, perhaps, Chester Counties. [Complaint ¶ 1, 4]

C. *Ancient Events Involving The Land In Issue*

4. Neither party has been able to furnish the Court with any document containing the terms of the 1760 Treaty of Pine Tree Hill. However, for the purpose of deciding this motion only, it has been assumed that the Treaty existed and granted the Catawbas some interest in the land in issue.

5. The 1763 Treaty of Fort Augusta was entered into by the Catawbas and British and colonial officials, and provides, in relevant part, only that:

> And we the Catawba Head Men and Warriors in Confirmation of an Agreement heretofore entered into with the White People declare that we will remain satisfied with the Tract of Land of Fifteen Miles square a Survey of which by our consent and at our request has been already begun and the respective Governors and Superintendant on their Parts promise and engage that the aforesaid survey shall be compleated and that the Catawbas shall not in any respect be molested by any of the King's subjects within the said Lines but shall be indulged in the usual Manner of hunting Elsewhere.

[Plaintiff's Exhibit 6]

6. Nothing in the 1763 Treaty of Fort Augusta prohibited the Catawbas from alienating the 15 mile square area of land referred to in the Treaty, or prohibited any person from acquiring that land. [*Id.*]

7. The Treaty of Nation Ford was executed in 1840. At the time that Treaty was executed the Catawbas had apparently leased to white settlers all of the land referred to in the 1763 Treaty of Fort Augusta. By the terms of the Treaty of Nation Ford the Catawbas agreed to grant their remaining interest in the land in issue to the State of South Carolina in return for the purchase of a tract of land having a value of $5,000, the payment of $2,500 upon their removal from their former lands, and $1,500 each year for nine years. [Plaintiff's Exhibit 12, 15]

8. On December 24, 1842, approximately 630 acres of land were purchased for the Catawbas and held in trust by the State of South Carolina. [Complaint ¶ 5, 19; The 630 acres are sometimes referred to as 638 or 652 acres. *See*, Plaintiff's Exhibit 15]

D. *The 1943 Memorandum of Understanding*

9. In 1943 the State of South Carolina, the Catawbas and the Office of Indian Affairs of the United States Department of Interior entered into a Memorandum of Understanding. Pursuant to that Memorandum of Understanding, South Carolina agreed to authorize the expenditure of up to $75,000 to purchase lands for the Catawbas, and, upon request, to convey to the United States in trust the land then held by South Carolina in trust for the Catawbas as a result of the 1840 Treaty. Pursuant to the Memorandum of Understanding, South Carolina also agreed to appropriate at least $9,500 annually in 1944, 1945 and 1946 to be expended by the Office of Indian Affairs, and to extend the rights and privileges of all citizens, including admission to schools, to the Catawbas. The Office of Indian Affairs further agreed to contribute annually such sums as were available to the welfare of the Catawbas, and to assist the Catawbas in matters involving education, medical treatment, and economic development. [Plaintiff's Exhibit 52]

E. *Events In The Twentieth Century Leading To The Enactment Of The Catawba Act.*

10. On August 1, 1953 House Concurrent Resolution 108 was passed. That Resolution declared that the policy of Congress was to make Indians within the United States subject to the same laws as other persons and to terminate any special status they might have had under federal law. [H.R. Con. Res. 108, H.R. REP. No. 2680, 83d Cong., 2d Sess. (1954), Defendants' Exhibit 3]

11. In September 1954, a special House Study Subcommittee on Indian Affairs reported that, on the basis of information collected by the Bureau of Indian Affairs, the Catawbas were among the Indian groups able to manage their own affairs and ready for termination. [H.R. Rep. No. 2680, 83d Cong., 2d Sess. (1954) at 2-3, Defendants' Exhibit 6]

12. In 1959 South Carolina Congressman Robert Hemphill introduced H.R. 6128, [105 Cong. Rec. 5466 (1959), Defendants' Exhibit 21] which was to become the Catawba Act. Congressman Hemphill told his congressional colleagues during debates on the legislation:

> It is my purpose to put these people and their land on an even keel, an even station, with other citizens of the United States.

[105 Cong. Rec. 5462 (1959), Defendants' Exhibit 22]

In hearings on the legislation he similarly stated:

> A majority of the Indians want this legislation. They need it to put them on the same status as other citizens with the same responsibilities.

[Transcript of the hearings on H.R. 6128 at 10]

13. Before the bill was introduced, the following steps were taken to insure that the Catawbas desired to be terminated:

a. Congressman Hemphill requested that a Bureau of Indian Affairs Program Officer be appointed to reside at Rock Hill for a sixty day period to develop a satisfatcory plan for the Catawbas. [Defendants' Exhibit 14];

b. The Catawbas adopted a resolution on January 3, 1959 requesting Congressman Hemphill to secure passage of legislation removing federal restrictions on the alienation of their land, [Resolution of Catawba Tribe of Indians, January 3, 1959, Defendants' Exhibit 17];

c. Congressman Hemphill met with the Catawbas on March 28, 1959 and explained the purpose of the legislation to be to dispose of the assets of the tribe and terminate federal responsibility to the tribe and its individual members. At the conclusion of the meeting, and following the explanation, the Catawbas again voted in favor of the bill. [Defendants' Exhibit 19]

14. On September 21, 1959 President Eisenhower signed the bill which became the Catawba Act. [Defendants' Exhibit 27]

15. Pursuant to the terms of 25 U.S.C. § 931, a plebiscite was held among the adult members of the Catawbas. The explanation of section five of the act (25 U.S.C. § 935) furnished to the Catawbas explained that:

> Section 5 revokes the tribal constitution which means that the tribe will no longer exist as a Federally recognized organization. In addition, just as the "tribe" no longer will be a legal entity which will be governed by Federal laws which refer to "tribes," so the individual members will no longer be subject to laws which apply only to Indians. Nothing in the act prohibits those interested in organizing under

State law to carry on any of the nongovernmental activities of the group.

[Defendants' Exhibit 29]

16. On July 1, 1960 the Secretary of the Interior published a notice in the Federal Register that a majority of the adult Catawbas had indicated their agreement to the provisions of the bill and that the provisions of the Catawba Act were effective as of that date. [25 Fed. Reg. 6305, Defendants' Exhibit 32]

17. On July 1, 1962 the Catawbas' constitution was revoked and the termination process was completed. [Defendants' Exhibits 35, 36]

18. The Catawbas have never been relieved of the consequences of the Catawba Act. The Bureau of Indian Affairs continues to list them among its current list of terminated Indian tribes. [Defendants' Exhibit 39]

19. On October 28, 1980, more than eighteen years and three months after the revocation of the Catawbas' consitution and more than twenty years and three months after the effective date of the Catawba Act, the complaint in this action was filed.

III. *CONCLUSIONS OF LAW*

After considering the undisputed facts (and assumed matters) referred to above and considering the relevant principles of law, this Court concludes that no genuine issue of material fact exists and that defendants are entitled as a matter of law to the entry of a judgment dismissing this action. As a result of the enactment of the Catawba Act four separate grounds independently require entry of judgment in favor of the defendants. The first ground, the failure of the plaintiff to commence this action within the time provided by the applicable statute of limitations, bars any claim the plaintiff may assert without regard to the basis of the claim. The remaining three grounds require dismissal because the enactment of the Catawba Act precludes the plaintiff from proving, as a matter of law, three elements of the prima facie case required to state a claim under the Nonintercourse Act.[1]

A. *The Provisions Of the Catawba Act Make The South Carolina Statute Of Limitations Apply To Any Claim The Catawbas May Have To The Land In Issue, And Any Such Claim Is Barred.*

1. Section five of the Catawba Act, 25 U.S.C. § 935, provides that after the Catawbas' constitution was revoked (which occurred on July 1, 1962):

> [T]he laws of the several States shall apply to them [the Catawbas] in the same manner they apply to other persons or citizens within their jurisdiction.

That explicit statutory language directed that state law apply to the Catawbas from the moment their constitution was revoked.

2. The legislative history of the Catawba Act, consisting of the statements of the bill's sponsor and the Department of the Interior, indicates that the Act was intended to provide the Catawbas the same privileges and same responsibilities as other South Carolina citizens. After its passage, the Catawbas were to have the same status as non-Indians. Thus, they and their claims were to be subject to state law in the same manner as other citizens and their claims.

3. Further, even if the provisions of the Catawba Act, as amplified by its legislative history, were less clear,

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[1] The defendants have suggested that they intend to dispute not only whether the Nonintercourse Act applies in this instance, but also whether the Nonintercourse Act may properly be construed to afford a private right of action. For the purposes of this motion the Court has assumed that such a private right of action exists.

termination of the Catawbas' special federal status accomplished the same result. The Catawba Act is unquestionably a "termination act" which terminated any special federal status the Catawbas may previously have held. The Catawba Act was passed during the period when House Concurrent Resolution 108 firmly established the federal policy to make Indians subject to the same laws as other persons and to terminate any special status the Indians may have had under federal law. The Catawba Act is in a form similar to the language contained in other termination acts, *see, e.g.*, 25 U.S.C. §§ 721-728 (Alabama-Coushatta); 25 U.S.C. §§ 564-564x (Klamath); 25 U.S.C. §§ 971-980 (Ponca). The Catawba Act was viewed, and referred to, as an act which would terminate any special Indian relationship to the federal government both before it was enacted, H.R. REP. No. 910, 86th Cong., 1st Sess. (1959), and S. REP. No. 863, 86th Cong., 1st Sess. (1959), Defendants' Exhibits 25, 26], and after it was enacted. [Excerpts from Hearings on S. 3174 Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 87th Cong., 2d. Sess. (1962); Bureau of Indian Affairs Branch of Tribal Relations list: Indian Tribes Terminated from Federal Supervision, April 1, 1981, Defendants' Exhibit 10, 39]; *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 133 n.1 (1972). The termination of the special federal status of the Catawbas' made state law apply to them, and to any claim they may have had. *See, e.g., Taylor v. Hearne*, 637 F.2d 689 (9th Cir., *cert. denied*, —— U.S. ——, 102 S.Ct. 291 (1981); *United States v. Heath*, 509 F.2d 16 (9th Cir. 1974); *Bryan v. Itasca County, Minnesota*, 426 U.S. 373 (1976).

4. Because section five of the Catawba Act explicitly made state law applicable to the Catawbas and the termination of the trust relationship accomplished the same result, South Carolina's statute of limitations began to run against any claim the Catawbas or the plaintiff may have had on July 1, 1962, the date the Catawbas' constitution was revoked. *See, e.g., Schrimpscher v. Stockton*, 183 U.S. 290 (1902); *Dillon v. Antler Land Co.*, 341 F. Supp. 734 (D. Mont. 1972), *aff'd*, 507 F.2d 940 (9th Cir. 1974) *cert. denied*, 421 U.S. 992 (1975); *Dennison v. Topeka Chambers Development Corp.*, 527 F. Supp. 611 (D. Kan. 1981).

5. The relevant South Carolina statute of limitations is § 15-3-340. The statute requires that an action to recover title or possession be brought within ten years. An action to recover title or possession brought more than 18 years after that statute began to run is, accordingly, barred. Although South Carolina appears to prevent a party from obtaining title by adverse possession from "tacking" his period of possession to a predecessor's period of possession (unless the land passed by inheritance) that rule is not relevant to the defendants' assertion that the plaintiff's claims are barred by the statute of limitations. *Haithcock v. Haithcock*, 123 S.C. 61; 115 S.E. 727 (1920).

6. Although the plaintiff asserts claims other than those based on the Nonintercourse Act, the United States imposed no general restraint on the alienation of lands owned by Indians other than the various versions of the Indian Trade and Intercourse Acts, the first of which was enacted on July 22, 1790, and imposed no specific restraint on the alienation of these lands. Even if such other claims existed, section five of the Catawba Act has made the South Carolina statute of limitations apply, and bar, those claims.

7. The plaintiff's arguments against the application of the South Carolina statute of limitations are unavailing:

a. It is inconsistent with the language and legislative history of the Catawba Act, and with official federal policy during the termination era, to read

the Act only to revoke the 1943 Memorandum of Understanding. The Catawba Act does not mention the Memorandum of Understanding. Moreover, an act of Congress was not required for the United States either to enter into or to terminate that Memorandum of Understanding.

b. Construing the Catawba Act as making state statutes of limitation apply and begin to run would not "extinguish" any rights. Under this construction, the Act merely changed the procedures by which the Catawbas' could enforce any rights they may have had and ended any trust obligation the federal government may once have had. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972).

c. Finally, *Menominee Tribe v. United States*, 391 U.S. 404 (1968), does not require a different result. First, the *Menominee* Court read other legislation, Public Law 280, to be in *pari materia* with the Menominee termination act because both acts had been passed by the same Congress. Public Law 280 does not apply to the Catawbas, 67 Stat. 588 as amended, 18 U.S.C. § 1162, and, therefore, *Menominee* has no application here. *Sac and Fox Tribe of Mississippi in Iowa v. Licklider*, 576 F.2d 145 (8th Cir.), *cert. denied*, 439 U.S. 955 (1978). Second, no provision of any treaty is claimed to protect any interest the Catawbas may have had, to have prevented the Catawbas from voluntarily alienating any interest they may have had, or to entitle the plaintiff to the recovery of the land in issue. Instead, plaintiff claims that it voluntarily conveyed, in violation of a statute an interest in land which it acquired by a treaty. *Menominee* recognized that statutory rights and privileges were subject to all the effects of termination.

B. *As A Result Of The Catawba Act, The Plaintiff Cannot Prove That It Is An Indian "Tribe".*

8. In order to prevail on its Nonintercourse Act claims, the plaintiff must demonstrate that it presently constitutes an Indian tribe within the meaning of the Nonintercourse Act, *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 581 and 587 n.8 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979), was a tribe when the Nonintercourse Act was violated, *Epps v. Andrus*, 611 F.2d 915, 918 (1st Cir. 1979), and continuously was a tribe in the intervening period. *See, Mashpee Tribe v. New Seabury Corp., supra*; *cf.*, 25 C.F.R. § 54.1 *et seq.*

9. The Catawba Act precludes the plaintiff, as a matter of law, from demonstrating present or continuous tribal existence. To be a tribe a group must have a legal and political existence setting it apart from the general mass. *United States v. Joseph*, 94 U.S. 614, 617 (1877); *United States v. Antelope*, 430 U.S. 641, 646 (1977). Congress may, however, terminate the political existence which is crucial to tribal existence. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

10. Section five of the Catawba Act revoked the tribal constitution and dissolved the former tribal government of the Catawbas. After the revocation of the tribal constitution the Catawbas were not a governmental entity. Instead, they were permitted to organize on a voluntary basis under state law to carry on nongovernmental activities of the group. Congress' explicit termination of the special federal relationship between the Catawbas and the United States bars the plaintiff, as a matter of law, from proving present or continuous tribal existence.

C. *Congress Ratified The Transfer Of The Land Effected By The 1840 Treaty.*

11. Congress may ratify, and thereby validate, a disputed transfer of Indian land in any manner which recognizes the occurrence or effect of the transfer, including a

statute enacted long after the transfer. *See, e.g., Seneca Nation of Indians v. United States*, 173 Ct. Cl. 912 (1965). A subsequent congressional enactment which recognizes that land formerly owned by Indians is no longer owned by them has been construed to validate the original transfer, *Seneca Nation, supra*, as has an enactment which authorized the United States to receive and administer the funds received from the disputed transfer. *Seneca Nation v. Christy*, 126 N.Y. 122 (1891), *writ of error dismissed on other grounds*, 162 U.S. 283 (1896).

12. Congress was unquestionably aware of the 1840 Treaty of Nation Ford and in fact reference is made to it in the House Committee Report. [H.R. REP. No. 910, 86th Cong., 1st Sess. (1959), Defendants' Exhibit 25] Further, section two of the Catawba Act, 25 U.S.C. § 932, explicitly refers to the assets held by the State of South Carolina in trust. Those "assets" included the 630 acres purchased for the Catawbas as a result of the 1840 Treaty. Congress' explicit recognition of those assets and treatment of them in the Catawba Act constitutes explicit recognition and an implicit ratification of the 1840 Treaty.

D. *The Catawba Act Ended Any Trust Relationship Between the United States And The Catawbas.*

13. Finally, to successfully maintain a Nonintercourse Act claim the plaintiff must demonstrate that the alleged trust relationship between it and the United States has never been terminated. *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D.R.I. 1976); *see Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975). In this case the Congress has, by enacting the Catawba Act, terminated any trust relationship which ever existed between the Catawbas and the United States.

A judgment order follows:

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 80-2050

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
also known as the
CATAWBA NATION OF SOUTH CAROLINA,
Plaintiff

v.

STATE OF SOUTH CAROLINA, *et al.*,
Defendants

[Filed June 14, 1982]

JUDGMENT ORDER

AND NOW, *June 10, 1982*, in accordance with the Findings and Conclusions mentioned in the foregoing Memorandum, there being no genuine issue as to any material fact, the motion of defendants for the entry of summary judgment in their favor is granted, and judgment is entered for the defendants and against plaintiff, and this civil action is dismissed of record.

DONE AND ORDERED at Pittsburgh, Pa., for filing at Columbia, South Carolina, effective when filed by the Clerk.

/s/ Joseph P. Willson
JOSEPH P. WILLSON
Senior District Judge

EXHIBIT F

The Statute To Be Construed
Text of 25 U.S.C. §§ 931-938 (1976)

CATAWBA TRIBE OF SOUTH CAROLINA: DIVISION OF ASSETS

§ 931. Publication of notice of agreement to division of assets; closure of roll; preparation of roll; protests against inclusion or omission from roll; finality of determination; final publication

When a majority of the adult members of the Catawba Indian Tribe of South Carolina, according to the most reliable information regarding membership that is available to the Secretary of the Interior, have indicated their agreement to a division of the tribal assets in accordance with the provisions of sections 931-938 of this title, the Secretary shall publish in the Federal Register a notice of that fact. The membership roll of the Catawba Indian Tribe of South Carolina shall thereupon be closed as of midnight of the date of such notice, and no child born thereafter shall be eligible for enrollment. The Secretary of the Interior with advice and assistance of the tribe shall prepare a final roll of the members of the tribe who are living at such time, and when so doing shall provide a reasonable opportunity for any person to protest against the inclusion or omission of any name on or from the roll. The Secretary's decisions on all protests shall be final and conclusive. After all protests are disposed of, the final roll shall be published in the Federal Register. Pub.L. 86-322, § 1, Sept. 21, 1959, 73 Stat. 592.

§ 932. Personal property rights; restrictions

Each member whose name appears on the final roll of the tribe as published in the Federal Register shall be entitled to receive an approximately equal share of the

tribe's assets that are held in trust by the United States in accordance with the provisions of sections 931-938 of this title. This right shall constitute personal property which may be inherited or bequeathed, but it shall not otherwise be subject to alienation or encumbrance. Pub.L. 86-322, § 2, Sept. 21, 1959, 73 Stat. 592.

§ 933. Distribution of assets

The tribe's assets shall be distributed in accordance with the following provisions:

Assets held in trust by State

(a) If the State of South Carolina by legislation authorizes assets that are held by the State in trust for the tribe to be included in the distribution plan prepared by the Secretary in accordance with the provisions of sections 931-938 of this title, they may be included.

Designation of land for church, park, playground, or cemetery

(b) The tribal council shall designate any part of the tribe's land that is to be set aside for church, park, playground, or cemetery purposes and the Secretary is authorized to convey such tracts to trustees or agencies designated by the tribal council for that purpose and approved by the Secretary.

Appraisal of assets; improvements

(c) The remaining tribal assets shall be appraised by the Secretary and the share of each member shall be determined by dividing the total number of enrolled members into the total appraisal. The tribal assets so appraised shall not include any improvements that were placed on the part of an assignment that is selected by an assignee, or his wife or children, pursuant to subsection (d) of this section. Such improvements shall be property of the assignee.

Assignee's option of selection; approval of selection by Secretary; title to assignment

(d) Subject to the provisions of this subsection, each member who is an adult under the laws of the State and who has an assignment shall be given the option of selecting and receiving title to any part of his assignment that has an appraised value not in excess of his share of the tribe's assets. A wife, husband, or child of such adult member may select and receive title to any part of such assignment that has an appraised value not in excess of her or his share of the tribe's assets; and, if the child is a minor under the laws of the State, the option on his behalf may be exercised by such adult member. Each selection shall be subject to the approval of the Secretary of the Interior, who shall consider the effect of the selection on the total value of the property. The title to any part of an assignment so selected may be taken in the name of the person entitled thereto, or the title to all or the parts of an assignment so selected may be taken in the names of the persons entitled thereto as tenants in common.

Selection by members having no assignment

(e) Each member who has no assignment may select and receive title to any part of the tribal land that is not selected pursuant to subsection (d) of this section and that has an appraised value not in excess of his share of the tribe's assets.

Sale and distribution of proceeds of assets not selected; bidding; member purchases; disposition of unsold assets

(f) All assets of the tribe that are not selected and conveyed to members pursuant to subsections (d) and (e) of this section shall be sold and the proceeds distributed to the members in accordance with their respective interests. Such sales shall be by competitive bid and any member shall have the right to purchase property

offered for sale for a price not less than the highest acceptable bid therefor. If more than one member exercises such right, the property shall be sold to the member exercising the right who offers the highest price. Any tribal assets that are not sold by the Secretary within two years from the date of the notice provided for in section 931 of this title shall be conveyed to a trustee selected by the Secretary for disposition in accordance with this subsection, and the fees and expenses of such trustee shall be paid out of funds appropriated for the purposes of sections 931-938 of this title. Pub.L. 86-322, § 3, Sept. 21, 1959, 73 Stat. 592.

§ 934. Land surveys and execution of conveyances by Secretary; title of grantee

The Secretary of the Interior is authorized to make such land surveys and to execute such conveyancing instruments as he deems necessary to convey marketable and recordable titles to the tribal assets disposed of pursuant to sections 931-938 of this title. Each grantee shall receive an unrestricted title to the property conveyed. Pub.L. 86-322, § 4, Sept. 21, 1959, 73 Stat. 593.

§ 935. Revocation of tribal constitution; termination of Federal services; application of Federal and State laws; citizenship status unaffected

The constitution of the tribe adopted pursuant to the Act of June 18, 1934 (48 Stat. 984), as amended, shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in sections 931-938 of this title,

however, shall affect the status of such persons as citizens of the United States. Pub.L. 86-322, § 5, Sept. 21, 1959, 73 Stat. 593.

§ 936. Rights, privileges, and obligations under South Carolina laws unaffected

Nothing in sections 931-938 of this title shall affect the rights, privileges, or obligations of the tribe and its members under the laws of South Carolina. Pub.L. 86-322, § 6, Sept. 21, 1959, 73 Stat. 593.

§ 937. Taxes; initial exemption; taxes following distribution; valuation for capital gains or losses

No property distributed under the provisions of sections 931-938 of this title shall at the time of distribution be subject to any Federal or State income tax. Following any distribution of property made under the provisions of sections 931-938 of this title, such property and income derived therefrom by the distributee shall be subject to the same taxes, State and Federal, as in the case of non-Indians: *Provided*, That for the purpose of capital gains or losses the base value of the property shall be the value of the property when distributed to the grantee. Pub.L. 86-322, § 7, Sept. 21, 1959, 73 Stat. 593.

§ 938. Education and training program; purposes; subjects; transportation; subsistence; contracts; other education programs

Prior to the revocation of the tribal constitution provided for in sections 931-938 of this title, the Secretary is authorized to undertake, within the limits of available appropriations, a special program of education and training designed to help the members of the tribe to earn a livelihood, to conduct their own affairs, and to assume their responsibilities as citizens without special services because of their status as Indians. Such program may

include language training, orientation in non-Indian community customs and living standards, vocational training and related subjects, transportation to the place of training or instruction, and subsistence during the course of training or instruction. For the purposes of such program, the Secretary is authorized to enter into contracts or agreements with any Federal, State, or local governmental agency, corporation, association, or persons. Nothing in this section shall preclude any Federal agency from undertaking any other program for the education and training of Indians with funds appropriated to it. Pub.L. 86-322, § 8, Sept. 21, 1959, 73 Stat. 594.

EXHIBIT G

The Nonintercourse Act
25 U.S.C. § 177 (1976)

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§ 177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

(R.S. § 2116.)